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No. ....

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

On Appeal from the Supreme Court
of California

Petition for Certiorari--Criminal Case

GEORGE DEUKMEJIAN
Attorney General
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General
Criminal Law Division
DANIEL J. KREMER
Assistant Attorney General
HARLEY D. MAYFIELD
Deputy Attorney General
JOHN W. CARNEY
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone (714) 237-7672

Attorneys for Petitioner

Questions Presented

Do the People of a State, acting collectively, have a right to due process of law under the Ninth and the Fourteenth Amendments to the United States Constitution, when they seek to promote justice and civil order by bringing criminal prosecutions?

Was this right to due process violated by the California Supreme Court in the present case, when, based almost entirely on the writings of individuals who were not examined and cross-examined by the parties, it concluded that any witness hypnotized before trial was totally incompetent to testify, no matter the method of inquiry undertaken and without regard to the results of that inquiry or its effect on the individual witness?

Was due process further violated when the California Supreme Court exempted criminal defendants from this total declaration of incompetence, and thereby sanctioned the presentation of evidence, by the Court's logic, of a suspect and nefarious nature, which other witnesses similarly hypnotized would be totally incompetent to present?

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THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

Petition for Certiorari--Criminal Case

Petitioner, the People of the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of the State of California, entered on March 11, 1982, reversing the judgment of conviction. A petition for rehearing was denied on June 4, 1982, and the opinion was ordered modified. The remittitur was

issued on June 7, 1982.

Opinion Below

The opinion of the California Supreme Court, reversing the judgment of guilty in People v. Shirley, (1982) 31 Cal. 3d 18, ___ Cal.Rptr. ___, appears as Appendix A of this petition. A copy of the California Supreme Court's order denying petition for rehearing, without opinion, appears as Appendix B, and an order modifying the opinion appears as Appendix C of this petition.

Jurisdiction

The judgment of the California Supreme Court was filed on March 11, 1982; a timely petition for rehearing was denied on June 4, 1982. This petition is filed within sixty days of that date, and is therefore timely. This Court's juris-

diction is invoked under 28 U.S.C., section 1257(3).

Constitutional Provisions Involved

United States Constitution, Amendments Nine and Fourteen.

The text of each of the above provisions is set forth in Appendix D to this petition.

Statement of the Case

On March 1, 1979, the District Attorney of Orange County filed a three-count information charging respondent Donald Lee Shirley, in Count One, with burglary in violation of California Penal Code section 459; in Count Two, with rape in violation of California Penal Code section 261(3); and, in Count Three, with oral copulation in violation of California Penal Code

section 288a(c). The information further alleged that during the commission of the offenses alleged in Counts One, Two, and Three, respondent personally used a deadly weapon within the meaning of California Penal Code section 12022(b). (CT 1-2.)[1/] On March 1, 1979, respondent was arraigned and pled not guilty. (CT 3.)

Trial by jury commenced on June 19, 1979. (CT 10-12.) On June 26, 1979, respondent was found guilty of burglary in the first degree, as charged in Count One; guilty of rape, as charged in Count Two; and not guilty of oral copulation, as charged in Count Three. In addition, the jury found not true the allegation of the use of a deadly weapon as charged in Count One, but found true the allegation of the use of a deadly weapon as charged in Count

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1. CT refers to the Clerk's Transcript on appeal.

Two. (CT 63-68.)

On August 10, 1979, probation was denied, and respondent was sentenced to the middle term of six years for the offense charged in Count Two. To that sentence was added a one-year enhancement pursuant to the 12022(b) finding. The trial court determined that the provisions of California Penal Code section 654 precluded punishment for the burglary charge, and the court made no mention of that offense during sentencing. (RT 513-516.)[2/]

Notice of appeal was filed on September 26, 1979.

On October 14, 1980, the California Court of Appeal, Fourth Appellate District, Division Two, affirmed the judgment of the Superior Court.

On December 24, 1980, the California

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2. RT refers to the Reporter's Transcript on appeal.

Supreme Court granted a hearing, and, on March 11, 1982, reversed the judgment of the Superior Court.

Facts Relating to the Offense

On January 25, 1979, Catherine Crump was a bartender at Bud's Cove, a drinking establishment located in San Clemente. (RT 42-43.) On that date, Ms. Crump finished work at approximately 6:30 p.m., had several drinks, left the bar at 8:30 p.m., arrived at her apartment at approximately 9:00 p.m., and fell asleep on the couch. (RT 48-58.)

Later that evening, Ms. Crump awoke and discovered respondent naked and standing in front of her, holding a butcher knife. Respondent ordered Ms. Crump to get up, and directed her to the bedroom. In the bedroom, Ms. Crump was forced to orally

copulate respondent, was tied up, gagged, and raped. Ms. Crump attempted to look at respondent. Respondent struck Ms. Crump in the face, and told her not to look at him. Later Ms. Crump again tried to look at respondent; this time, respondent struck her very hard on the hip. (RT 59-72, 179.)

Respondent then cut Ms. Crump's bindings with a pair of scissors, pulled down Ms. Crump's gag, and pulled her into the living room. In the living room, Ms. Crump observed respondent's clothing lying on the floor, with a knife and screwdriver resting on them. (RT 73-77.)

In the living room, the pair sat on the couch, Ms. Crump attempting to befriend respondent, in the hope he would not kill her. After approximately half an hour, respondent left to get beer. Ms. Crump, fearing respondent's reaction, neither left the apartment nor called for help.

Respondent returned. (RT 77-82.)

Respondent and Ms. Crump resumed talking. The telephone rang. Ms. Crump answered the phone and discovered the caller was a girlfriend. Ms. Crump hung up and told respondent her girlfriend was coming over and he would have to leave. Respondent left. (RT 98, 124-126.)

Ms. Crump called the police. The police arrived, and transported her to a hospital. During the examination at the hospital, the doctor found a five-inch in diameter bruise on Ms. Crump's hip, and noted that she complained of pain in that area. The doctor also discovered wrinkling about her wrists, consistent with her hands having been tied with a fabric. (RT 107-108, 113.)

On April 30, 1979, Ms. Crump was hypnotized. Under hypnosis, she was able to recall events during the incident which

she had been unable to remember before the hypnotic session. (RT 146, 250-253, 255.)

Reasons for Granting the Writ

The People of the State of California, acting collectively, have a right to due process of law under the Ninth and Fourteenth Amendments to the United States Constitution, when they seek to promote justice and civil order by bringing criminal prosecutions. That right to due process was violated by the California Supreme Court, when, based almost entirely on the writings of individuals who were not examined or cross-examined by the parties, it concluded that any witness hypnotized before trial was totally incompetent to testify to any matter covered under hypnosis, no matter the method of inquiry undertaken and without regard to the results of that inquiry or its effect on the individual witness.

The California Supreme Court further denied the People their right to due process, when it exempted from this total declaration of incompetence criminal defendants, thereby sanctioning the presentation of evidence, by the Court's logic, of a suspect and nefarious nature.

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Argument

I

PERSONS, ACTING COLLECTIVELY AS REQUIRED BY STATE LAW THROUGH ELECTED STATE LAW-ENFORCEMENT OFFICIALS, IN ATTEMPTING TO PROMOTE JUSTICE AND AND THE RIGHT TO LIFE, LIBERTY, AND PROPERTY BY BRINGING CRIMINAL PROSECUTIONS, ARE ENTITLED IN THAT FUNDAMENTAL ENDEAVOR TO DUE PROCESS OF LAW AS GUARANTEED BY THE NINTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The Preamble to the United States Constitution, in stating the very purpose for the document and indeed the very purpose of society, states:

> "We the people of the United States, in order to . . . establish justice, insure domestic tranquillity, . . . promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

That it is an essential component of justice that the People be entitled to due

process, was forcefully stated by this Court in United States v. Nixon (1974) 418 U.S. 683:

> ". . . 'the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer.' Berger v. United States, 295 U.S., at 88. We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." (Id., at p. 709.)

This Court went on to make clear that the People's right to criminal justice and to adequate process and procedural fairness is guaranteed by the Constitution. The Court stated:

"[T]he allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts." (United States v. Nixon, supra, 418 U.S., at p. 712.)

The Court also observed that it was not concerned, in the Nixon opinion, with the balance between a President's generalized interests in confidentiality and the need for relevant evidence in civil litigation. The Court then stated, pertinent to the present inquiry:

"We address only the conflict between the President's assertion of a generalized privilege of confidentiality and the constitutional need for relevant evidence in criminal trials." (Id., at p. 712 fn. 19; emphasis added.)

The Court then made this statement:

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair

administration of criminal justice." (United States v. Nixon, supra, 418 U.S., at p. 713; emphasis added.)

These pronouncements, of course, mirror earlier, less complete statements of this principle. "[J]ustice, though due to the accused, is due to the accuser also." (Snyder v. Massachusetts (1934) 291 U.S. 97, 122.) "Society also has a right to a fair trial." (Fay v. New York (1947) 332 U.S. 261, 288.) "The people of the State are also entitled to due process of law." (Stein v. New York (1953) 346 U.S. 156, 197.)

It is of no consequence that this Court has not attributed the right of the People to due process and fair trial to any particular section or amendment to the Constitution. This Court, for example, has found a fundamental right to privacy, even though never explicitly stated in any part of the Constitution. The Court has found this right in either or both the Fourteenth

Amendment's right to personal liberty or the Ninth Amendment's general reservation of fundamental rights. (See Roe v. Wade (1973) 410 U.S. 113, 152-153.) (Justice Goldberg's concurring opinion, in Griswold v. Connecticut (1965) 381 U.S. 479, concerning the Ninth Amendment and the protection it affords to fundamental rights not explicitly listed in the Constitution, is particularly relevant. [Id., at p. 486 et seq.])

As noted, the Preamble indicates an essential purpose of the Constitution is to "establish justice." This Court, in Nixon, made clear a fundamental, constitutionally required component of justice is that the People be entitled to due process. Thus, just as with privacy, the People's right to due process must exist in the Ninth Amendment's reservation of rights and in the Fourteenth Amendment's guarantee of liberty and personal security. This right is far

more than penumbral. It is so fundamental, that it helps to make up the fabric across which the other shadows of constitutional liberty move.[3/]

It is, further, of no consequence that this People's right to due process abides, because of the nature of our prosecutorial system, in persons collectively rather than individually. Authority exists for the proposition that States of the Union are not "persons" for the purposes of the Fourteenth Amendment. (See South Carolina v. Katzenbach (1966) 383 U.S. 301, 323-324.)

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3. The existence of the People's right to due process is, in any case, obviously reciprocal to a criminal defendant's explicitly guaranteed rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution. Those rights guarantee ordered justice, which must clearly have as their corollary the guarantee that both parties to criminal litigations go forward, whenever possible, equally armed with those procedural rights necessary to an ascertainment of truth, and therefore to the justice guaranteed both the accused and the accuser.

Petitioner is unable to find any case applying this rule to a criminal prosecution, and, after United States v. Nixon, supra, such authority would in any case be overruled. It was, after all, the People of the United States whose right to due process the Court found of constitutional dimension in the Nixon case.

In California, individual persons are forbidden by law to bring criminal prosecutions. The power rests solely with the District Attorney and the Attorney General. (Hoines v. Barney's Club, Inc. (1980) 28 Cal.3d 603, 611; People v. Municipal Court (1972) 27 Cal.App.3d 193, 203-208.) The decision has been rationally made, that the People's constitutional right to criminal justice should be advanced and protected by agents elected by the People to so act. This necessary, collective approach does not in the least dilute the proposition that

each individual person has an interest in, and a personal right to, due process in the accomplishment of criminal justice. To conclude that a people's right to due process exists but cannot be asserted because of the necessary organization of the criminal prosecution mechanism, is to deny the constitutional imperatives stated in United States v. Nixon, supra.

It should be noted that petitioner recognizes the People's right to due process, while of obvious constitutional dimension, is not coextensive with the due process rights existing in individual criminal defendants. Petitioner does not contend that a precise balancing process must be carried on between the People's right to due process and the various due process rights of suspects and defendants. Petitioner's claim is a narrow one. Petitioner merely argues that it has a constitutional right

to those fundamental components of a fair trial, when the assertion of those rights, necessary as they obviously are to establishing justice, do not offend any legitimate right of the defendant. Thus, in Nixon, the People could assert their right to compulsory process against a non-defendant, since compulsory process was necessary to ensure the People's right to due process and ultimately to criminal justice. The defendant obviously had no cause to object to the assertion of that right, since it did not affect any legitimate right of his own. However, for example, the People could not assert a due-process right to discovery, if to do so would offend a defendant's right against self-incrimination.

In the present case, the actions of the California Supreme Court have denied

the People their right to due process, by denying fundamental components of a fair trial, when the People's assertion of those rights offends no legitimately assertable right of the defense.

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II

THE DECISION BY THE CALIFORNIA SUPREME COURT TO DECLARE ALL PERSONS INCOMPETENT TO TESTIFY TO ANY SUBJECT COVERED DURING A HYPNOTIC INTERVIEW, BASED ON SCIENTIFIC, AND LEGAL ARTICLES AND TREATISES, WITHOUT EXTENDING TO THE PARTIES THE RIGHT TO EXAMINE AND CROSS-EXAMINE THE AUTHORS OF THOSE DOCUMENTS, IS TO DENY THE PARTIES, AND IN THIS CASE THE PEOPLE, THEIR RIGHT TO DUE PROCESS

In the present case, the California Supreme Court creates a conclusive presumption declaring incompetent any witness (except a criminal defendant), who prior to trial had undergone a hypnotic interview concerning the subject matter of his proposed testimony, whether or not that interview resulted in any increased recollection and whether or not the proponents of the testimony intended to elicit at trial such additional

recollections. (Appen. A, pp. A-139 - A-142.) This determination and the manner in which it was reached raise serious federal constitutional issues. First, the process by which this determination was reached and the "evidence" on which it is based have denied to the People their right to due process.

To understand this denial, it is first necessary to review the evidence concerning hypnosis presented at trial. The People offered the testimony of a crime victim whose recollection had been, to a degree, enhanced by hypnosis. Objection was interposed, no evidence concerning hypnosis was offered, the trial court overruled the objection and the victim testified. During the defense case a psychiatrist testified concerning the dangers inherent in the forensic use of hypnosis. The defendant was convicted.

The California Supreme Court applied the Kelly-Frye (Frye v. United States (App.D.C. 1923) 293 F. 1013; People v. Kelly (1976) 17 Cal.3d 24) test for the admission of scientific evidence, viz. scientific evidence is admissible if the technique used is generally accepted in the scientific community to which it belongs. The Court looked in part to the defense evidence concerning hypnosis presented at trial, but relied to a far greater extent on a body of scientific and legal literature indicating dangers in the forensic use of hypnosis, and concluded that the technique was not generally accepted as a reliable device for improving recollection. The Court went on to declare that any witness, except a criminal defendant, who had been hypnotized before trial, was incompetent to testify concerning any matter covered while under hypnosis.

Petitioner argued that scientific literature was not evidence and could not be used to determine the attitude of an entire scientific community.

The California Supreme Court has attempted to meet this argument by stating such articles have only a limited utility. The Court stated they were doing no more than determining if, from a "fair overview" of the literature, it appeared that scientists, significant either in number or expertise, publicly opposed the use of hypnosis. The Court stated if that finding were made, then it could be safely concluded that the technique did not meet the general acceptance requirements of Kelly-Frye. (Appen. A, pp. A-98 - A-106.)

This conservative approach to the use of scientific literature has obvious practical appeal. The difficulty is that the California Supreme Court did not feel in

the least constrained by its own declaration of the limited uses to which such literature could be put.

The California Supreme Court did not merely conclude there was no general acceptance concerning the product of hypnotic sessions; it went much farther, and declared that any witness or victim (but not defendant) who had been hypnotized became incompetent to testify, whatever the nature and however complete the memory which existed before hypnosis, however expert the hypnotist, and even if the hypnosis resulted in the retrieval of no new recollections. (Appen. A, pp. A-139 - A-142.)

To arrive at this remarkable and devastating conclusion,[4/] it was necessary

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4. In the original version of its opinion the California Supreme Court declared that this rule of incompetence was to be given

for the California Supreme Court not merely to perform some objective and general overview of the literature, but rather it required the Court to rely on

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(Fn. 4 continued)

retroactive effect. (Appen. A, p. A-140, fn. 53.)

In the modified version of the opinion, the Court stated:

> "The principles stated in this opinion will govern the admissibility of the testimony of any witness who submits to pretrial hypnosis after the date of this decision. We take no position at this time as to the application of those principles to witnesses hypnotized before the date of this decision." (Appen. C, pp. C-4 - C-5 [mod. 7].)

There is, therefore, an ominous cloud above this whole question. It is not impossible that in some future case the California Supreme Court will determine that the principles enunciated in Shirley have retroactive effect. If this occurs, many serious cases may have to be dismissed and others will go forward with relevant and even crucial evidence declared to be inadmissible. This potential makes even more dramatic the People's claim to denial of due process.

the conclusion of certain writers concerning the nature of hypnosis, its effect on recollection, and attitudes about recollection, and the effect of such on the competence of individual witnesses and victims (but not defendants) in individual specific cases.

Once the Court relied on these conclusions to declare hypnotized witnesses incompetent rather than using a broad overview merely to deny admission to the products of hypnosis, it violated the People's right to due process. When the Court relied on these conclusions, it no longer could hide behind the argument that it was merely determining whether the literature demonstrated or did not demonstrate a general acceptance of the technique. The Court had, therefore, moved byond its self-defined Kelly-Frye analysis, and had used the

literature to arrive at its own scientific conclusions and to make an all-encompassing (perhaps even retroactive) declaration of incompetence. (Except for criminal defendants, of course.)

In so doing, the Court declared witnesses incompetent based on the conclusions of "witnesses" whom they had never heard testify, whom the parties never examined or cross-examined, who might be alive or dead, in honor or disrepute, or who might have changed their minds.

It is certainly a fundamental component of any justice system, and the due process that makes it just, that the parties be allowed to confront the evidence detrimental to their position and to present evidence and witnesses favorable to their position. (See, e.g., U.S. Const., Fourth Amend.) In United

States v. Nixon, the People were found to possess a constitutional right to compulsory process. The right to process is, of course, meaningless if a court can deny to a party a hearing in which he can present and deal with the testimony or evidence so compelled. Essentially, in the present case, the People were denied such a hearing. No questions could be directed to the authors of any article nor was any opportunity available to offer any witness who could contradict the conclusions cited by the Court.

Next, the creation of a conclusive presumption of incompetence itself raises a grave federal constitutional question. In a society governed by law, the victim of a crime must rely on the law for protection. One can conceive of no more fundamental right than the right of a rape victim to give relevant testimony of facts

within her own knowledge at the trial of the rapist. Under the California Supreme Court's decision the victim in this case is denied that right because, having been hypnotized, she is conclusively presumed incompetent to testify. In view of the victim's manifest and substantial interest, it would appear she has a due process right to a hearing to determine whether she is incompetent to testify. (See Stanley v. Illinois (1972) 405 U.S. 645, 657-658.)

In proceeding in the manner in which it did and in creating a conclusive presumption of incompetence, the California Supreme Court denied to the People of the State of California a fundamental component of due process, the assertion of which would not have offended any constitutional right of the defendant.

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III

THE PEOPLE WERE DENIED DUE PROCESS WHEN, HAVING FOUND HYPNOSIS SO NEFARIOUS AND DANGEROUS A TECHNIQUE THAT NOT ONLY WAS ITS PRODUCT INADMISSIBLE BUT ITS SUBJECTS INCOMPETENT, THE CALIFORNIA SUPREME COURT NONETHELESS IN TWO SENTENCES EXEMPTED FROM THAT RULE CRIMINAL DEFENDANTS

Having spent 67 pages chronicling what it believed to be the unacceptable dangers of hypnosis, having recoiled in horror at the potential for overt and covert suggestion it found in hypnosis, having illuminated, to its satisfaction, the spectre of confabulation, having expressed its conclusion that hypnosis could be used purposely or accidentally to render a witness impervious to cross-examination, having declared any subject of hypnosis incompetent, no matter the technique used, the quality of memory before hypnosis, or the amount or recollection revived, the

California Supreme Court then in two sentences declared that this rule did not apply to criminal defendants. (Appen. C, p. C-4 [mod. 5].)

In a concurring opinion to his own majority opinion in People v. Williams, Justice Robert Gardner of the California Court of Appeal, Fourth Appellate District, after his perceptive criticism of the California Supreme Court's opinion in the present case, states:

> "Another aspect of Shirley disturbs me even more. In its modification Shirley determined that a defendant who submits to pretrial hypnosis may nevertheless testify [citation]. The idea that the predator may testify and yet his victim may not offends my sense of justice. It appears to me that the scales of justice are tilted--dangerously." (People v. Williams (1982) ___ Cal.App.3d ___ [slip opn: conc. opn., pp. 4-5, filed June 17, 1982, in 4 Crim. 12526].)

The California Supreme Court states the defendant's exception is based on his

fundamental right to testify in his own defense. Justice Otto Kaus of the California Supreme Court, in his concurring and dissenting opinion, as modified, retorts:

> "Finally, it seems to me that if the majority opinion is correct, then the exception which the opinion establishes for previously hypnotized defendants who wish to testify is unsupportable. Whether the right to testify in one's defense is 'fundamental' (People v. Robles (1970) 2 Cal.3d 205, 215) or constitutional (cf. Washington v. Texas (1967) 388 U.S. 14, 20-22), there can be no right to offer testimony which suffers from all of the potential vices which have triggered the majority's total ban on the testimony of hypnotized witnesses. While I have tried to explain why, in my opinion, the majority goes much too far, if the majority's reasoning is correct, I can see no basis for excepting the defendant on trial." (Appen. C, p. C-8 [mod. 2].)

Clearly Justice Kaus is correct. A defendant has no constitutional charter

to offer with his testimony evidence that is irrelevant, immaterial, or incompetent. We do not allow a defendant to present hearsay, rumor or conjecture; we do not allow him to invade privileges; we do not allow him to testify if he refuses to take the oath. If a defendant makes an offer of proof that his testimony will involve only matters that are legally inadmissible, he simply cannot testify.

In the present case, the California Supreme Court determined that the subjects of hypnosis are so tainted, their memory so irrepairably altered, their vulnerability to cross-examination so changed, that they are incompetent to testify. Nonetheless, the California Supreme Court is prepared to allow such a risk to the truth-determining process by allowing criminal defendants to be hypnotized and then testify.

This rule creates the following, anomalous situations. Suppose, for instance, a victim and a suspect are placed in the same room. A single psychiatrist enters the room and simultaneously hypnotizes them. The psychiatrist then simultaneously questions the pair. Both the victim and the suspect tell exactly the same story, portions of which are incriminating and portions of which may be exculpatory. Under this bizarre rule established by the California Supreme Court, the suspect is allowed to testify, while the victim is shuffled off to some vague, shadowy legal existence shared by the severely retarded and the insane.

Another example is instructive. Suppose two individuals are suspected of committing a robbery. They are eventually arrested and defense counsel for

one of them has his client hypnotized. Under hypnosis, that defendant has certain recollections which are helpful to his defense. While that defendant is perfectly competent to testify in his own trial (supposing the trials are severed), he is incompetent to testify in the other defendant's trial. Thus, this individual suffers an even more bizarre fate than the victim who had been hypnotized, since he moves in and out of the legal netherworld of incompetence.

These hypotheticals indicate that the California Supreme Court's rule is capricious and nonsensical.

The California Supreme Court has determined that the defendant may present evidence in a trial which is, by the very standards established by the Court, of such a suspect character that it renders all other human beings incompetent to

testify. To create such a rule is to create a senseless and unsupportable double standard which is not compelled by any constitutional right held by the defendant and which therefore denies to the People their right to a fair trial and to due process of law.

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For the foregoing reasons, petitioner respectfully submits that the writ of certiorari should be issued to review the decision of the Supreme Court of the State of California.

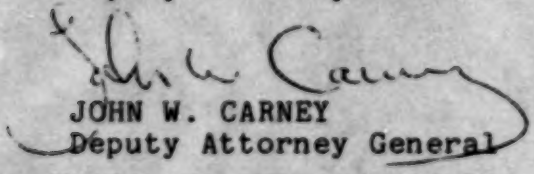
Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General

ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General
Criminal Law Division

DANIEL J. KREMER
Assistant Attorney General

HARLEY D. MAYFIELD
Deputy Attorney General



JOHN W. CARNEY
Deputy Attorney General

Attorneys for Petitioner
THE PEOPLE OF THE STATE
OF CALIFORNIA

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

GEORGE DEUKMEJIAN
Attorney General
State of California
JOHN W. CARNEY
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101

PEOPLE OF THE STATE
OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which County the within mentioned mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I served the within PETITION FOR WRIT OF CERTIORARI--CRIMINAL CASE: An original and 39 copies on the United States Supreme Court as follows: Michael Rodak, Jr., Clerk, U.S. Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

STEPHEN C. HOSFORD
Attorney at Law
12832 Main Street
Garden Grove, California 92640

CECIL HICKS
District Attorney
County of Orange
Post Office Box 808
Santa Ana, California 92702

LEE A. BRANCH
County Clerk
County of Orange
Post Office Box 838
Santa Ana, California 92702
FOR DELIVERY TO
HON. MASON L. FENTON, JUDGE

CLERK OF THE COURT
Court of Appeal
Fourth Appellate District
Division Two
303 West Third Street, Room 640
San Bernardino, California 92401

CLERK OF THE COURT
Supreme Court
State of California
350 McAllister Street, Room 4050
San Francisco, California 94102

Each envelope was then sealed and, with the postage prepaid, deposited in the United States Mail by me at San Diego, California, on the 13 day of July.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, July 13, 1982.

KAREN K. LUNA
NOTARY PUBLIC — CALIFORNIA
COUNTY OF SAN DIEGO
My Commission expires Feb. 03, 1984

Clifford E Reed Jr.
CLIFFORD E. REED, JR.

subscribed and sworn to before me
this 13th day of JULY, 1982.

Karen K. Luna
Notary Public in and for said County and State

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CLERK

82-78

No. . . .

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

On Appeal From The Supreme Court
Of California

APPENDICES TO PETITION FOR CERTIORARI

GEORGE DEUKMEJIAN
Attorney General
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General
Criminal Law Division
DANIEL J. KREMER
Assistant Attorney General
HARLEY D. MAYFIELD
Deputy Attorney General
JOHN W. CARNEY
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (714) 237-7672

Attorneys for Petitioner

APPENDIX A

[Filed March 11, 1982]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Crim. 21775

(Sup.Ct.No. C-41560)

THE PEOPLE,
Plaintiff and Respondent,
v.
RONALD LEE SHIRLEY,
Defendant and Appellant.

The principal question on this appeal is whether a witness may be allowed to testify after he has undergone hypnosis for the purpose of restoring his memory of the events in issue. The question is new to this court, but has been often litigated in our sister states and extensively studied by medical science. In accord with recent and persuasive case law and

SEE CONCURRING AND DISSENTING OPINIONS

the overwhelming consensus of expert opinion, we conclude that the testimony of such a witness should not be admitted in the courts of California.

I

The record discloses a classic case of conflicting stories. There were only two witnesses to the principal events: the complaining witness, Catherine C., told the jury that defendant compelled her by threat and force to submit to sexual intercourse and to orally copulate him; defendant testified, however, that Catherine willingly participated in the act of intercourse, and there was no oral copulation. The jury believed part of Catherine's story, as it convicted defendant of rape; but it also apparently found that she was lying when she described in detail the alleged act of oral copulation, as it acquitted defendant of that

charge.[1/] The jury doubtless had a difficult task, since Catherine's performance as a witness was far from exemplary: the record is replete with instances in which her testimony was vague, changeable, self-contradictory, or prone to unexplained lapses of memory. Indeed, on occasion she professed to be unable to remember assertions that she had herself made on the witness stand only the previous day.

In such circumstances it is particularly important that the testimony of the complaining witness be free of taint, lest a mistaken conviction result. Yet as we shall see, in the case at bar the prosecution contaminated Catherine's

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1/ In addition, defendant was convicted of the derivative charge of unlawfully entering Catherine's apartment with intent to commit a felony, presumably the rape. (Pen. Code, § 459.) The court stayed execution of the sentence on this count until completion of the sentence on the other, the stay to become permanent at that time.

testimony by subjecting her to a hypnotic experience on the eve of trial for the purpose of "filling the gaps" in her story. To allow her to testify against defendant after that experience was error; and in the light of the entire record, we are of the view that the error caused a miscarriage of justice requiring reversal of the judgment. (Cal. Const., art. VI, § 13.)

A

Catherine was a 32-year-old bartender at a saloon named Bud's Cove, not far from the Camp Pendleton Marine base. The first prosecution witness, Marine Sergeant Charles Lockskin, testified that at 8:50 p.m. on January 25, 1979, he entered Bud's Cove and approached Catherine, whom he had known for several months. She was off duty, and "looked like she was feeling kind of bad." She had a half-consumed martini in front of her, was under

the influence of alcohol, and staggered when she walked.

After talking with her for some 15 minutes, Lockskin offered to get her something to eat and take her home. They drove in his car to a take-out restaurant, purchased some food, and arrived at Catherine's apartment house at 9:30 p.m. She vomited when she got out of the car; as this was happening, defendant came up to Lockskin and addressed him by name; Lockskin asked him to leave, and defendant did so. Lockskin then helped Catherine into the apartment and went into the kitchen to prepare some drinks. When he returned to the living room, however, she had passed out on the couch and was fast asleep. After failing to rouse her by shaking her, he covered her with a blanket, turned out the lights, locked the front door, and departed. It was shortly before

10 p.m.

The next witness was Catherine. She testified that on the evening in question she went off duty at Bud's Cove at 6:30 p.m., ordered two martinis, and sat "relaxing" until Lockskin came in. Her testimony as to her activities with Lockskin generally corroborated his, and she admitted she could "feel" the alcohol she had consumed.

Catherine's version of the events occurring after she fell asleep was as follows: she testified that she awoke some time later, still lying on the couch fully clothed, and found defendant standing naked by the coffee table holding a butcher knife.[2/] Defendant assertedly took her

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2/ Catherine later told the police that defendant was holding both a butcher knife and an "ice pick." She subsequently changed her story and described the latter as a large Phillips screwdriver. At trial the prosecution produced neither knife, ice pick, screwdriver, nor any other weapon.

into the bedroom, ordered her to remove her clothes, and compelled her to orally copulate him for several minutes. The witness admitted that she felt "like I was in a dream" and events were moving in "slow motion."[3/]

Catherine then stated that defendant made her get on her knees, tied her hands behind her back and gagged her with nylon stockings, put her head down on the bed, and had intercourse with her in that position for up to half an hour. When she tried to turn her head to see who he was, he struck her with his hand and ordered her not to look at him; later he put a pillow over her head for the same purpose, and struck her on the hip. She claimed the latter blow sobered her so that she no

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3/ As noted above, the jury impliedly found that her testimony describing the alleged act of oral copulation was false.

longer felt the effects of her prior drinking.

Until this point the apartment had remained totally dark, and she could see the intruder only as "a shadow." According to Catherine, however, defendant abruptly desisted from further intercourse, removed her bonds and gag, took her back into the living room, and turned on the lights.[4/] For the next half hour the two sat naked on the couch, she on his lap, and chatted. Finally he asked her if she liked beer, and she replied that she did; he volunteered to get some from his apartment, and told her where he lived.[5/] He

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4/ She claimed that as they entered the living room defendant told her he had intended to take her money but "he seen my bible on the nightstand next to the bed and changed his mind." The witness did not explain how defendant could have recognized a bible in the dark.

5/ Defendant lived close by, in an apartment separated from Catherine's complex by a single building.

dressed and left on this errand; on his return with the beer he took his clothes off again, she got back on his lap, and the conversation resumed.

After another quarter of an hour, defendant suggested they take a shower together, and she agreed. As they entered the bathroom, however, the telephone rang. The caller was assertedly a "girlfriend" of Catherine named Mickie, who announced she was coming over to the apartment. Catherine relayed this fact to defendant, and told him that he could return at another time and she would cook dinner for him. According to Catherine, defendant then got dressed, wrapped the knife and screwdriver in an extra T-shirt he had brought, thrust them down the front of his pants, and left when Mickie arrived. Catherine testified she told Mickie she had been raped by a Marine, and Mickie

gave her a strong sedative -- a 100-milligram dose of a drug called Mellaril.[6/] Mickie stayed for half an hour, and immediately after she left Catherine called the police. According to Catherine, it was 10 minutes before 1 a.m.

On cross-examination Catherine admitted that during their long conversation in the living room defendant told her numerous personal details about himself, e.g., that he lived in the next apartment building, that his name was Don, that he was 22 years old, that he was married and had a child, that he was a Marine but was not happy in the service, and that the next morning he had to go to Bridgeport,

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6/ Catherine admitted that Mellaril had been prescribed for her to take four times a day, and that she had taken such a dosage for about six months. She denied, however, that she had used the drug within the previous 18 months.

California, for cold-weather training.[7/] She claimed that she engaged defendant in the foregoing conversation only because she was afraid he would do her further harm; yet she conceded that when defendant went to get the beer he left the knife and the screwdriver on her living room floor but that she did nothing about them, and that while he was gone she remained sitting naked on the couch. Although she had a telephone she did not call the police or anyone else for help, nor did she dress and go to the nearby apartment of the building manager who was admittedly "a big guy," nor did she even lock the front door. She also acknowledged that she did not know Mickie's last name, address, or telephone number, or where she was at the time

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7/ As appeared from the testimony of the police officer who responded to her call and took a description, defendant also told Catherine exactly which company he was in at Camp Pendleton.

of trial, and indeed had never seen her since the night in question.[8]

On redirect examination Catherine testified that until defendant turned on the lights in the apartment, she thought the person having intercourse with her was an older man who resembled defendant and had flirted with her at the bar where she worked.[9]

Police Officer Russell Lane testified that the telephone call reporting the rape came at 1:45 a.m., an hour later than Catherine claimed. He went immediately to her apartment and found her under the influence of alcohol: her breath had the smell of someone who "had been drinking quite heavily," her speech was slow and at times difficult to

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8/ Not surprisingly, the prosecution did not produce Mickie as a witness.

9/ Defendant testified that Catherine told him "she thought I was some major."

understand, and her walk was unsteady. She told the officer she had been brought home "very drunk" from Bud's Cove at midnight, that she fell asleep on the couch, and that she awoke in her bed at 12:30 a.m. She gave the officer a physical description of defendant, and repeated the personal information defendant had disclosed to her during their conversation. She then complained that her buttocks hurt, and the officer took her to a local hospital.

At the hospital she was examined by a physician. He testified that he found a bruise on her right hip and "crease marks" on her wrists. But although the latter were consistent with her hands having been tied by a fabric, he could not tell their cause and described them as the kind of marks one receives from sleeping on wrinkles in the bed linen. She reported to the physician

that she used "occasional Mellaril and alcohol frequently." He testified that Mellaril is "a major tranquilizer," and that in doses of 100 milligrams or more per day it is prescribed primarily for psychotic states, schizophrenia, and manic-depressive cases.10/

After the physical examination, Police Officer Leonard Goodwin took a statement of the evening's events from Catherine, The next morning Officer Lane went to defendant's apartment and arrested him as he was leaving to report for duty. When the officer announced the charges were burglary and rape, defendant became angry and said he had "picked up a drunk bitch at Bud's Cove and took her home and fucked her," and "now she wants to report

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10/ The doctor's testimony concerning the uses of Mellaril was corroborated by another physician-witness, Dr. Donald Schafer. The remainder of Dr. Schafer's testimony is discussed below. (See Part I B, post.)

that he raped her" and "that is all a bunch of bullshit."

Defendant took the stand in his own defense. He testified that a few days before these events Catherine had waited on him at Bud's Cove. On the evening in question he entered the bar and saw her sitting with Sergeant Lockskin, whom he recognized. When Lockskin went to the men's room, defendant approached her and asked how she was feeling. They had a brief conversation; according to defendant, she told him her name was Cathy, indentified the apartment house in which she lived, and invited him to "grab a six-pack sometime and come over." When Lockskin returned, defendant left the bar and bought some beer at a liquor store. After failing to locate a friend of his, defendant walked to Catherine's apartment house. As he approached, Catherine and Lockskin drove up and

defendant spoke briefly with the latter.[11] Defendant then returned to his own apartment for a while, drank some beer, and went back to Catherine's building. When asked why he did so, he explained, "Well, my wife was back home in Indiana. I was by myself. Kind of lonely. And I had an invitation to come to her apartment."

On his arrival, defendant knocked twice on Catherine's door; there was no response, but he thought he heard someone inside who was moaning as if ill. When no one answered further knocking, he called her name through the window and lifted off the screen. He testified that he believed someone inside was sick.[12]

11/ As noted above, Sergeant Lockskin corroborated defendant's testimony in this regard.

12/ The defendant was not the first person who had removed that screen for the purpose of climbing through Catherine's bedroom window. In the prosecution's case-in-chief Sergeant Lockskin testified that he was the

At that point Catherine opened the front door and defendant asked, "Are you okay?" He handed her the screen; she put it next to the front door, went back to the living room, and lay down on the couch. Defendant sat next to her and repeated his question, "Are you okay?" Her reply was to put her arms around his neck and begin kissing him. He responded, and at his suggestion they soon moved to the bedroom. There she cooperated in helping him remove her clothes; defendant returned briefly to the living room for his cigarettes, stripped down, and rejoined her on the bed. They proceeded to have intercourse in the "missionary

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(Fn. 12 continued)

previous tenant of the same apartment; that Catherine had moved in with him for a month; and that about three weeks before the night in question he returned home with her and discovered he had lost his key. Lockskin testified he thereupon removed the screen on the bedroom window and climbed through it into the apartment.

position," then turned so that he entered her vaginally from behind. She abruptly asked defendant to stop and he did so. He inquired what was wrong, and she replied that she "couldn't be emotionally turned on by men."

Defendant's testimony as to the ensuing events was substantially the same as Catherine's. They sat unclothed on the living room couch talking for a half an hour, and he told her all about himself. In turn, she told him that she too was from Indiana, that times were hard for her and she was having problems, and that she had seven children in Knightstown Home for Children. She became upset and began to cry, saying that nobody loved her. As Catherine had testified, defendant went home to get some beer and then suggested they take a shower, but the evening ended when Mickie called on the telephone.

He dressed and waited for the latter to arrive, feeling that Catherine "was just in a wrong state of mind to be left alone." After some minutes Mickie entered carrying a six-pack of beer under her arm, and defendant left.

Defendant acknowledged the angry denial he made when Officer Lane accused him of rape the next morning; and he further denied that he broke into Catherine's apartment, or threatened her with a knife or screwdriver, or tied her up or struck her, or had intercourse with her without her consent, or engaged in any act of oral copulation.

Finally, a number of Marine officers, including defendant's platoon commander, his company first sergeant, and his company commander, testified in his behalf. On the basis of their experience they unanimously expressed high personal regard for defendant's truthfulness and

honesty, and reported that he had a good reputation for those traits of character. His first sergeant further testified that he was made aware of any altercations occurring in the company, and that defendant had no history of engaging in aggressive or violent behavior.

B

We relate next the evidence bearing on the issue of hypnosis. Prior to trial, counsel for defendant moved to exclude all testimony of the complaining witnesses that was the result of her having been hypnotized. He offered to prove that the case was originally set for trial on May 1, 1979, but was trailed because of the unavailability of an adequate jury pool; that in the evening of April 30, 1979, i.e., more than three months after the events in question, the deputy district attorney assigned to the case, Richard Fulton, had Catherine hypnotized by another deputy district attorney, Richard Farnell, at the courthouse and in

the presence of Mr. Fulton and one Terry Moore; and that Catherine made certain statements under hypnosis which would cause her testimony at trial to be significantly different from her testimony at the preliminary hearing. Counsel then identified one such discrepancy, and argued that "this is an improper use of hypnosis" because "it is not in fact refreshing a witness's recollection" but "it is in fact manufactured evidence." He distinguished those cases in which hypnosis has been used for such purposes as helping an eyewitness to remember a license plate number. He denied that any court in this state had ruled the use of hypnosis permissible in all cases, and charged that here the People were attempting "to expand hypnosis into an area [in] which they cannot lay adequate foundation for its reliability" as a tool for refreshing recollection.

The trial court denied the motion, ruling that prior hypnosis of a witness affects the weight but not the admissibility of the testimony. Accordingly, the court directed that if Catherine gave evidence that she could not remember -- or did not exist -- before she was hypnotized, the fact and circumstances of that hypnosis should be put before the jury.

Pursuant to this ruling, Catherine was allowed to testify to a number of matters that she assertedly had been unable to recall on two occasions prior to hypnosis, i.e., when she gave statements to the police on the night of the events in question, and when she testified at the preliminary hearing. For example, on those occasions she stated that that after falling asleep in her clothes on the couch in her living room, she awoke in her bedroom and found herself lying

naked on the bed, gagged and bound. At trial, as noted above, she testified instead that when she awoke she was still on the couch and fully clothed, and defendant then forced her to go into the bedroom and get undressed. Again, prior to hypnosis she stated that defendant had sexual intercourse with her before as well as after the alleged act of oral copulation, while at trial she testified that the oral copulation preceded any intercourse whatever. Prior to hypnosis she stated that her hands were tied during the oral copulation, while at trial she denied this claim. Finally, prior to hypnosis she stated that the first time she saw the knife in defendant's hand was when they returned to the living room after the sexual intercourse, while at trial she testified she saw it when she awoke on the couch before entering the bedroom.

Both counsel explored the nature and effect of Catherine's hypnotic experience. According to Catherine, before being hypnotized she recalled the events of the evening in question only "vaguely." She discussed the gap in her recollection with Deputy District Attorney Fulton, and consented to be hypnotized "for the purpose of going back over what occurred that night." She verified that she was hypnotized on April 30, 1979, in the courthouse, by Mr. Farnell; although the latter had "some training," he was not a psychiatrist or even a physician. She had not been hypnotized before, but she "just knew" that it enables a person to "remember more than normal."

Apparently she was not disappointed in that expectation. She agreed that the hypnosis at least partly "cured" her recollection as to "this sort of dreamlike period that we're talking

about." She credited the hypnosis with causing her to "fill in the gap" in her memory, and also to recall that certain events took place in a different sequence. In particular, she specifically ascribed to the effect of hypnosis each of the above-listed changes between her testimony at trial and her pretrial statements to the police and testimony at the preliminary hearing.

The defense called Dr. Donald W. Schafer as an expert witness to testify on the subject of hypnosis. Dr. Schafer is a board-certified psychiatrist with 16 years of private practice and 10 years on the staff of the University of California at Irvine, where he is a clinical professor of psychiatry. He has had extensive training in hypnosis, and has used it in

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his practice for two decades.[13/] Dr. Schafer acknowledged that hypnosis has certain valid medical uses, such as pain control and relief from various psychosomatic symptoms. In appropriate cases it can also be used for the treatment of neuroses, e.g., by assisting a patient to recover repressed memories of traumatic events, including rape.

Dr. Schafer warned, however, that there are grave risks in relying for other purposes on the accuracy of memories recalled under hypnosis. He explained that while no one knows exactly how the

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13/ In addition, Dr. Schafer is a past national president of the Society for Clinical and Experimental Hypnosis, a fellow of the American Society of Clinical Hypnosis, and the founding president of both the California Society of Clinical Hypnosis and the Orange County Society of Clinical Hypnosis. As well as using hypnosis in his psychiatric practice, he has taught advanced courses in medical hypnosis and hypnoanalysis. Finally, as of the date of trial he had written 10 to 15 professional articles on hypnosis.

human mind stores information, it does not act like a videotape recorder, i.e., a machine capable of "playing back" the exact images or impressions it has received. Rather, "there are many things that alter the storage of exact memory." There is therefore no assurance, the doctor testified, that a memory recalled in hypnosis is correct. On the contrary, a person under hypnosis can be mistaken in his recollection, or can hallucinate, or can "confabulate," i.e., create a false or pseudomemory, or can even deliberately lie. Indeed, it may be easier to lie under hypnosis, because from the viewpoint of the person in the trance "the hypnosis would put the responsibility on the shoulders of the hypnotist."

Dr. Schafer made four additional important points. First, when a person is put under hypnosis and asked to recount an event, no one is able to determine

whether he is telling the truth.[14/] Second, when a person has a subsconscious motive to distort the truth, e.g., in order to make himself look better in the eyes of others, that motive will usually operate even under hypnosis; indeed, "hypnosis would in a sense give [him] permission" to engage in such distortion. Third, the effect of hypnosis on a preexisting memory is usually additive, i.e., it may permit the recall of additional details; if instead the person remembers the event differently under hypnosis, the discrepancy implies either that his statement describing the preexisting memory was a lie or that the memory under hypnosis was a confabulation. Fourth, when a person has been asked to recall an event while under hypnosis,

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14/ Dr. Schafer stated that this was not only his opinion but the consensus of his profession, and he attributed that consensus to the work of Dr. Martin T. Orne of Philadelphia. We cite Dr. Orne's work in some detail below. (See Part III D, post.)

and after hypnosis is asked to remember the same event, the effect of the prior hypnosis is to remove all doubt he may have had about the event; such persons would be "conviced that what they had said in hypnosis was the truth."

On cross-examination Dr. Schafer testified that although the hypnotic induction in the case at bar was excellent from the viewpoint of technique, the hypnotist did not take into consideration Catherine's possible motivation to distort the truth under hypnosis; one of the factors leading Dr. Schafer to question that motivation was the above-discussed discrepancies in her testimony.

Summing up, Dr. Schafer had no doubt as to the unreliability of hypnosis for discovering the truth of a particular matter. He warned that "hypnosis in no way is a truth serum-like experience,"

and concluded "there is no way of assessing the reliability of something produced in hypnosis, as such."

The prosecution neither discredited Dr. Schafer's opinion on cross-examination, nor called any expert witness of its own.

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II

While passing through periods of vogue and of disrepute, hypnosis has been practiced in one form or another for centuries.[15/] Its use in legal proceedings is a relatively recent phenomenon, however, and the rules governing the admissibility of evidence induced by hypnosis are mainly found in the case law of the past two decades. The question of such admissibility has arisen primarily in two contexts: (1) efforts by the defendant to introduce, for the truth of the matter asserted, exculpatory statements made while under

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15/ For a brief summary of its history, see 9 Encyclopaedia Britannica (15th ed. 1974) Hypnosis, page 133; for more detailed historical overviews, see Gibson, Hypnosis: Its Nature and Therapeutic Uses (1977) chapter 2; Sheehan & Perry, Methodologies of Hypnosis: A Critical Appraisal of Contemporary Paradigms of Hypnosis (1976) pages 3-39; Handbook of Clinical and Experimental Hypnosis (Gordon ed. 1967) chapter 2.

hypnosis; and (2) efforts by the prosecution to introduce incriminating testimony of a witness whose memory has assertedly been refreshed by hypnosis. As will appear, the law is well settled as to the former but in a state of flux as to the latter.

A

We begin with a brief discussion of the cases excluding evidence of the truth of statements made under hypnosis, because the reason for their rule bears closely on the present inquiry. The point has recently been adjudicated by our court. In People v. Blair (1979) 25 Cal.3d 640, 664, the defendant sought to introduce, over objection, tape-recorded statements favorable to him that were made by an eyewitness while she was under hypnosis during a pretrial interview. The trial court excluded the evidence, ruling that the statements were not admissible as past

recollection recorded. On appeal the defendant conceded the latter ruling was correct,[16/] but contended the statements should have been admitted in any event because they were critical to the defense and were likely to be trustworthy, citing Chambers v. Mississippi (1973) 410 U.S. 284, 298-302.

We unanimously rejected this contention, explaining that "the trial court's ruling did not elevate a fastidious adherence to the technicalities of the law of evidence over the right to a fair trial. For here, unlike Chambers, there was no solid assurance that the hearsay statements were reliable. It appears to be the rule in all

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16/ A prior statement is admissible as past recollection recorded only if, inter alia, the witness testifies that it was true. (Evid. Code, § 1237, subd. (3).) In Blair the witness was unable to so testify.

jurisdictions in which the matter has been considered that statements made under hypnosis may not be introduced to prove the truth of the matter asserted because the reliability of such statements is questionable. While in California such statements -- and those made under the influence of truth serum -- may be used to establish a basis for expert opinion, the cases either state specifically or assume that they are not admissible to prove the truth of the matter therein contained. [Citations.]" (Italics added; 25 Cal.3d at p. 665.) We further rejected the defendant's claim that the circumstances of Blair made it likely the witness was telling the truth: "The fact that she was a neutral person and had no reason to falsify her statements under hypnosis and that she intended to tell the truth are obviously insufficient to establish reliability, especially in the

light of expert testimony that there is no way to determine if a person under hypnosis is relating actual facts." (Italics added; id. at pp. 665-666.)

As we observed in Blair (id. at p. 665), "The rule is the same in other jurisdictions." Indeed, no court has held otherwise. Thus in the leading case of Greenfield v. Commonwealth (Va 1974) 204 S.E.2d 414 [92 A.L.R.3d 432], a defendant who had no memory of the events surrounding the crime nevertheless made statements relating to those events while hypnotized. In holding the statements inadmissible, the Virginia Supreme Court stressed that "Most experts agree that hypnotic evidence is unreliable because a person under hypnosis can manufacture or invent false statements. [Citations.] A person under a hypnotic trance is also subject to heightened suggestibility. [Citations.]" (Id. at p. 419.) In subsequently denying

habeas corpus relief to the same defendant, the federal district court stated that "the very reason for excluding hypnotic evidence is due to its potential unreliability." (Greenfield v. Robinson (D.Va. 1976) 413 F.Supp. 1113, 1120.) Other courts have rejected hypnotic evidence expressly because of its lack of reliability,[17] while still others have simply declared such evidence inadmissible per se.[18]

Particularly relevant here are the cases that have excluded this evidence

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17/ Emmett v. State (Ga. 1974) 205 S.E.2d 231, 235 ("the reliability of hypnosis has not been established"); State v. Harris (Ore. 1965) 405 P.2d 492, 498 (hypnosis "does not guarantee truthfulness"); People v. Harper (Ill. App. 1969) 250 N.E.2d 5, 7 ("the scientific reliability of neither [hypnosis nor "truth serum"] is sufficient to justify the use of test results of either in the serious business of criminal prosecution").

18/ State v. Pierce (S.C. 1974) 207 S.E.2d 414, 418; State v. Pusch (N.D. 1950) 46 N.W.2d 508, 521-522; People v. Ebanks (1897) 117 Cal. 652, 665-666.

on the ground of the well-known Frye rule. (Frye v. United States (D.C. Cir. 1923) 293 F. 1013.) That rule conditions the admissibility of evidence based on a new scientific method of proof on a showing that the technique has been generally accepted as reliable in the scientific community in which it developed. (Id. at p. 1014.) Finding that no such showing had been made with regard to hypnosis, the Oklahoma court held in Jones v. State (Okla. Crim. App. 1975) 542 P.2d 1316, 1236-1327, that expert testimony as to the truthfulness of statements made by the defendant under hypnosis was inadmissible for the same reason that the results of lie detector and "truth serum" tests are excluded, i.e., because such tests "have not attained sufficient scientific and psychological accuracy nor general recognition as being capable of definite and certain interpretation." (Id. at p. 1326.)

Again, the Michigan court so held in People v. Hangsleben (Mich. App. 1978) 273 N.W.2d 539, 543-544, declaring that the defendant's attempt to prove the reliability of statements made in hypnosis by showing the qualifications of the hypnotist "is an inadequate foundation for scientific evidence" under the Michigan version of the Frye rule. (Id. at p. 544.) And in Rodriguez v. State (Fla. App. 1976) 327 So.2d 904, 904, the Florida court excluded such evidence under its version of Frye, i.e., that the reliability of a new method of proof must be generally accepted by scientists or "'have passed from the stage of experimentation and uncertainty to that of reasonable demonstrability.'" Applying this test, the court held the evidence inadmissible because it was "unconvinced of the reliability of statements procured by way of hypnosis."

B

With this unanimous body of law in mind we turn to the second group of cases mentioned above, i.e., those addressing the admissibility of the testimony of a witness whose memory has assertedly been refreshed by hypnosis. The seminal case was Harding v. State (Md. App. 1968) 246 A.2d 302. There the prosecuting witness, Mildred Coley, was found wounded by the roadside, the apparent victim of an aggravated sexual assault; she was in a state of shock and could not remember anything that had happened after being shot by the defendant, who had been riding with her in a car. Several weeks later she was taken to the police barracks to be hypnotized by a psychologist from the state hospital. The police furnished the hypnotist with the details of the case, and he informed Coley he was going to "get her memory back."

After he put her under hypnosis he invited two state troopers in, and directed her to tell him "everything that happened" on the day in question. She related certain events incriminating the defendant, with occasional prompting by the hypnotist. He denied suggesting to her any answers to his questions, but did give her the suggestion that after she awoke she would relate the same events. He then brought her out of the trance, and under questioning by one of the state troopers she duly gave the same answers she had given while hypnotized; the hypnotist conceded that his posthypnotic suggestion had made her "want to do so." He testified that in his opinion her story under hypnosis was reliable because certain of her statements were corroborated, because "her recall afterwards was essentially the same," and because she had "no reason" to lie. On the witness stand Coley gave the story a

third time, claiming that "When I was asleep it all came back to me."

On appeal from his conviction of assault with intent to commit rape, the defendant urged that the pretrial hypnosis rendered Coley's testimony inadmissible. Affirming the judgment, the Maryland Court of Special Appeals summarily dismissed this contention on the single ground that the witness believed her memory of the events was accurate: "The admissibility of Mildred Coley's testimony concerning the assault with intent to rape case causes no difficulty. On the witness stand she recited the facts and stated that she was doing so from her own recollection. The fact that she had told different stories or had achieved her present knowledge after being hypnotized concerns the question of the weight of the evidence which the trier of facts, in this case the jury, must decide." (Id. at p. 306.)

In the ensuing 10 years these few sentences spawned a series of similar decisions permitting witnesses to testify to recollections that were assertedly refreshed by pretrial hypnosis. The Attorney General, naturally, relies heavily on those decisions in the case at bar. But an examination of the opinions discloses a significant evolution in the approach of the courts to this issue. In the earlier cases, as in Harding, the courts engaged in little or no analysis of the issue, and merely reiterated the general proposition that the fact of hypnosis "goes to the weight, not the admissibility" of the evidence. If they discussed the point at all, the courts simply noted that the witness believed he was testifying from his own memory and that his credibility could presumably be tested by ordinary cross-examination. (See State v. Jorgensen (Ore. 1971) 492 P.2d 312, 315;

Wyller v. Fairchild Hiller Corporation (9th Cir. 1974) 503 F.2d 506, 509-510; Kline v. Ford Motor Co., Inc. (9th Cir. 1975) 523 F.2d 1067, 1069-1070; State v. McQueen (N.C. 1978) 244 S.E.2d 414, 427; Clark v. State (Fla. App. 1979) 379 So.2d 372, 375.)

As the decade drew to a close, however, the courts began to take notice of the dangers inherent in using hypnosis for this purpose, and developed increasingly complex procedural "safeguards" in the hope of forestalling those dangers. Thus until 1978 the Ninth Circuit Court of Appeals had applied the Harding rule only in civil cases (see Wyller and Kline, supra); in extending the rule in that year to criminal cases, the court warned: "We are concerned, however, that investigatory use of hypnosis on persons who may later be called upon to testify in court carries a dangerous potential for abuse.

Great care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis." (United States v. Adams (9th Cir. 1978) 581 F.2d 193, 198-199.) In a footnote at this point the court proposed several safeguards that it apparently believed would eliminate such "potential for abuse."19/

19/ "We think that, at a minimum, complete stenographic records of interviews of hypnotized persons who later testify should be maintained. Only if the judge, jury, and the opponent know who was present, questions that were asked, and the witness's responses can the matter be dealt with effectively. An audio or video recording of the interview would be helpful." (Id. at p. 199, fn. 12.) Although the court found those safeguards had not been observed in Adams and declared "we do not approve of the hypnosis methods used here" (fn. omitted; id. at p. 199), it nevertheless rejected the claim of error on the ground that the defendant had failed to object to the inadequate foundation.

In United States v. Awkard (9th Cir. 1979) 597 F.2d 667, 669, the court reaffirmed its holding in Adams and explained (at fn. 2) that the purpose of

In People v. Smrekar (Ill. App. 1979) 385 N.E.2d 848, 853, the Illinois' Court of Appeals followed the Harding rule but recognized that "the use of hypnosis is not without problems. 'Asking a patient to recall only real events, or to verify aspects of the material as true or false, reduces but does not remove the element of fantasy' [citation]. The hypnotized subject is also subject to suggestion by the hypnotist." Accordingly, the court held admissible the identification testimony of a previously hypnotized eyewitness only because of a number of factors in the record which the court impliedly viewed as guaranteeing reliability.20/

(Fn. 19 Continued)

the Adams safeguards is "to ensure that posthypnosis statements are truly the subject's own recollections."

20/ Thus the court stressed that the hypnotist was a physician with extensive experience in using hypnosis; only he and

In subsequent cases the required safeguards became very elaborate indeed. Thus in State v. Hurd (N.J. 1981) 432 A.2d 86, the eyewitness-victim was unable or unwilling to identify the defendant as her assailant, and did so only after being hypnotized three weeks later. The defendant moved before trial to suppress her proposed in-court identification, and extensive expert testimony was taken on the subject of the reliability of hypnotically induced recollection. The trial court ordered the testimony suppressed.

On appeal, the New Jersey Supreme Court held that the admissibility of

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(Fn. 20 Continued)

the witness were present at the hypnotic session; although the session was not recorded, the hypnotist denied he did anything to suggest the identification to the witness; the identification was corroborated; and the witness had had ample opportunity to see the defendant at the time of the crime. (Id. at pp. 854-855.)

hypnotically induced testimony must be judged by the Frye standard, but immediately qualified the rule to require only that in any case the hypnosis produce a recall that is, in effect, no more inaccurate than that of the average witness who has not been hypnotized. (Id. at pp. 91-92.) The court recognized a number of dangers inherent in the hypnotic process which "explain why hypnosis, unless carefully controlled, is not generally accepted as a reliable means of obtaining accurate recall" (id. at p. 93); the dangers included the subject's extreme suggestibility, loss of critical judgment, tendency to confabulate, and excessive confidence in his new "memories." The court nevertheless declined to hold such testimony inadmissible per se, asserting that "the reliability of ordinary eye-witnesses reveals similar shortcomings." (Id. at p. 94.)

Yet to minimize if possible the admitted risks of hypnosis, the court went on to adopt an intricate set of procedural prerequisites to its use. First, the trial court should "evaluate both the kind of memory loss that hypnosis was used to restore and the specific technique employed, based on expert testimony presented by the parties." (Id. at p. 95.) The court should then inquire into "the amenability of the subject to hypnosis," because persons capable of entering deeper trances may be more suggestible. (Id. at p. 96.) In turn, the party offering the testimony must prove he has complied with no less than six additional procedureal requirements, intended to furnish an adequate record and insure "a minimal level of reliability." (Id. at pp. 96-97.)21/

21/ The six requirements, suggested by Dr. Orne, are set out at pages 96-97 of 432 A.2d. They may be summarized as

Finally, in order to guarantee "strict compliance" with these prerequisites, the proponent of the testimony must establish its admissibility by "clear and convincing" proof. (Id. at p. 97.) "This burden," said the New Jersey court, "is justified by the potential for abuse of hypnosis, the genuine likelihood of suggestiveness and error,

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(Fn. 21 Continued)

follows: (1) the hypnotist must be a psychiatrist or psychologist experienced in the use of hypnosis; (2) to avoid bias the hypnotist must be independent of the prosecution or defense; (3) all information the police or defense give the hypnotist before the session must be recorded; (4) before the session the subject must describe in detail to the hypnotist the facts as he remembers them, and the hypnotist must avoid influencing that description; (5) all contacts between the hypnotist and the subject -- i.e., the prehypnotic examination, the hypnotic session, and the posthypnotic interrogation -- must be recorded, preferably on videotape; and (6) no person other than the hypnotist and the subject may be present during the session, or even during the prehypnotic examination and the posthypnotic interrogation.

and the consequent risk of injustice." (Ibid.)[22] Because the court found that several of the listed procedural requirements had not been met on the record in Hurd, it affirmed the order suppressing the proposed testimony.[23]

C

After careful consideration, we decline to join in the foregoing effort to develop a set of "safeguards" sufficient

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22/ Two justices refused to join in this opinion, believing that hypnotically induced testimony should not be admitted in a criminal trial under any circumstances: "To do so would have the defendant's innocence or guilt depend on the jury's speculating, on the basis of conflicting scientific-medical testimony, whether the identification was true recollection or implanted by the hypnosis." (Id. at p. 98 [conc. opn. of Sullivan, J.].)

23/ Two New York trial courts have adopted an even more elaborate set of nine prerequisites to the admissiblity of such testimony, derived from an unreported but widely cited ruling of a Wisconsin trial court in 1979. (People v. Lewis (County Ct. 1980) 427 N.Y.S.2d 177; People v. McDowell (County Ct. 1980) 427 N.Y.S.2d 181.)

to avoid the risks inherent in admitting hypnotically induced testimony. To begin with, we are not persuaded that the requirements adopted in Hurd and other cases will in fact forestall each of the dangers at which they are directed.24/ Next, we observe that certain dangers of hypnosis are not even addressed by the Hurd requirements: virtually all of those rules are designed to prevent the hypnotist from exploiting the suggestibility

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24/ For example, one of the requirements set forth in Hurd is that all contacts between the hypnotist and the subject must be recorded, for the stated purpose of enabling the trial court to determine what "cues" the hypnotist may have conveyed to the subject by word or deed; and the opinion strongly encouraged the use of videotape to make such recordings. (432 A.2d at p. 97.) Yet as the same opinion recognizes elsewhere (at p. 93), "Because of the unpredictability of what will influence a subject, it is difficult even for an expert examining a videotape of a hypnotic session to identify possible cues." If even an expert cannot confidently make that identifcation, it is vain to believe that a layman such as a trial judge can do so.

of the subject; none will directly avoid the additional risks, recognized elsewhere in Hurd, that the subject (1) will lose his critical judgment and begin to credit "memories" that were formerly viewed as unreliable, (2) will confuse actual recall with confabulation and will be unable to distinguish between the two, and (3) will exhibit an unwarranted confidence in the validity of his ensuing recollection. (432 A.2d at pp. 93-94.) The Attorney General proposes no "safeguards" to deal with these knotty problems.

Lastly, even if requirements could be devised that were adequate in theory, we have grave doubts that they could be administered in practice without injecting undue delay and confusion into the judicial process. To be sure, it would usually be easy to determine if the hypnotist was an appropriately trained psychiatrist or psychologist. It might be

harder to establish that he was sufficiently independent of the prosecution or defense to avoid subconscious bias. And it would certainly be far more difficult to prove strict compliance -- which Hurd demands -- with each of the remaining "safeguards." It strains credulity, for example, to believe that a conscientious defense counsel would meekly agree that the prosecution had recorded every bit of relevant information conveyed to the hypnotist prior to the session, or that the hypnotist had conveyed absolutely none of that information to the subject either while extracting the latter's prehypnotic version of the facts or while questioning him both during and after hypnosis, or that every single contact between the hypnotist and

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the subject, no matter how innocuous, had been preserved on videotape.[25/]

On the other hand, it takes little prescience to foresee that these and related issues would provide a fertile new field for litigation. There would first be elaborate demands for discovery, parades of expert witnesses, and special pretrial hearings, all with concomitant delays and expense. Among the questions our trial courts would then be expected to answer are scientific issues so subtle as to confound the experts. (See, e.g., fn. 24, ante.) Their resolution would in turn generate a panoply of new claims that could be raised on appeal, including difficult

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25/ The requirement that the pre-hypnotic examination, the hypnotic session, and the posthypnotic interrogation all be videotaped would make it difficult, moreover, to comply with the further requirement that the hypnotist and the subject be completely alone during each of those phases.

questions of compliance with the "clear and convincing" standard of proof. And because the hypnotized subject would frequently be the victim, the eyewitness, or a similar source of crucial testimony against the defendant, any errors in ruling on the admissiblity of such testimony could easily jeopardize otherwise unimpeachable judgments of conviction. In our opinion, the game is not worth the candle.

For all these reasons, we join instead a growing number of courts that have abandoned any pretense of devising workable "safeguards" and have simply held that hypnotically induced testimony is so widely viewed as unreliable that it is inadmissible under the Frye test. This disposition, of course, is consistent with the above-discussed case law uniformly excluding evidence of the truth of statements made under hypnosis. (See Part II A, ante.) And both rules, as we shall see, are

supported by the overwhelming consensus of contemporary scientific opinion on hypnosis.

The first case to depart from the Harding approach was People v. Hangsleben (Mich. App. 1978) supra, 273 N.W.2d 539. There, after he had confessed, the defendant was hypnotized and assertedly recalled the events of the crime for the first time, stating that a third party was the true culprit. He sought to prove at trial that the hypnosis had refreshed his recollection, in order to bolster his story on the witness stand and to explain his prior inconsistent admission to the police. The Michigan court distinguished Harding, and held that the evidence was properly excluded because the defendant "failed to establish the reliability of hypnosis as a memory-jogging device." (Id. at p. 544.) His sole showing was to assert the qualifications of the hypnotist and to refer to the theory of memory restoration

by hypnosis. Ruling "That does not demonstrate the general scientific acceptance" required by the Michigan version of the Frye test, the court rejected the evidence for lack of proof that hypnosis has been successful in restoring the memory of others, either by their testimony or that of experts. (Id. at p. 545.)

In State v. La Mountain (Ariz. 1980) 611 P.2d 551, it was the prosecution that failed to prove the reliability of hypnosis used to restore a witness' recollection. The defendant was convicted of sexually assaulting a customer in a laundromat. At trial, two prosecution witnesses identified the defendant as the person who committed a similar assault in the same laundromat fifteen months earlier, one was the victim of that assault, and the other was a bystander who seized the assailant. Both witnesses, however, had been unable to identify the defendant

from a photographic lineup until their memories were "refreshed" by hypnosis. The hypnotist was a deputy sheriff who had attended various law enforcement institutions giving instruction in hypnotism. He used a so-called "TV technique," asking the subject to visualize the events of the crime as if they were being played back on a video-tape machine.

On appeal, the Arizona Supreme Court held it was error to allow the two witnesses to the prior assault to testify after they had been hypnotized. The court reasoned (at p. 555), "There was no expert testimony regarding the effect of hypnosis upon a person's memory, and we do not know from the record what effect the previous hypnotic identification had on the witness's later in-court testimony and identification. Although we perceive that hypnosis is a useful tool in the

investigative stage, we do not feel the state of the science (or art) has been shown to be such as to admit testimony which may have been developed as a result of hypnosis. A witness who has been under hypnosis, as in the case here, should not be allowed to testify when there is a question that the testimony may have been produced by that hypnosis." The court nevertheless affirmed the judgment, finding from the evidence that the result would have been the same if these witnesses had not testified.

The gap in proof identified in Hangsleben and La Mountain was quickly and thoroughly filled in the leading case of State v. Mack (Minn 1980) 292 N.W.2d 764. In that case the defendant met Marion Erickson in a bar, and eventually took her to a motel on his motorcycle. Thereafter he telephoned for an ambulance and told the drivers that he and Erickson had been engaged in intercourse when she started

bleeding from the vagina. Erickson was drunk, her speech was unclear, and she had difficulty walking. At the hospital a single deep cut was found inside her vagina; she told one intern that fingers had been inserted in her vagina during sexual activity, and another that she had been in a motorcycle accident. After the doctors advised her they did not believe her explanations, she reported to the police that she had been assaulted. She could not, however, remember much of the events of the night in question.

Six weeks later the police caused Erickson to be hypnotized by a lay hypnotist without professional training. After placing her in a deep trance, the hypnotist invited the police investigator and another officer to join them. He then told Erickson that she would recall the events as though on a television screen. In the course of the session Erickson

accused the defendant of stabbing her repeatedly in the vagina. At the end of the session the hypnotist gave her a post-hypnotic suggestion to the effect that she would be able to remember very clearly everything that happened on the night in question. The next day she gave the same police investigator a written statement recounting as her present memory the events she had related under hypnosis.

The defendant was arrested and charged with aggravated sexual assault. The question of the admissibility of Erickson's proposed testimony was litigated at an extensive pretrial hearing. Following that hearing, and pursuant to Minnesota procedure, the trial court stayed the prosecution and certified to the state supreme court the question "whether a previously hypnotized witness may testify in a criminal proceeding concerning the subject matter adduced at

the pretrial hypnotic interview." (292 N.W.2d at p. 765.) In a well-reasoned opinion the Minnesota high court unanimously answered in the negative, holding such testimony inadmissible as a matter of law.

The court began by emphasizing that no less than five experts on hypnosis and memory retrieval had testified at the hearing, making an extensive record on which to decide the legal issue. The court also observed that the record "demonstrates the truth of Dr. Orne's observation that a case-by-case decision on the admissibility question would be prohibitively expensive, and reveals the difficulty of getting experts qualified to testify about hypnosis as an investigative rather than a therapeutic tool." (Id. at p. 766.)

The defendant in Mack contended that Erickson's hypnotically refreshed recollection was too unreliable to merit admission, and that to allow such testimony would deny him the right to effective cross-examination. The state contended that the testimony should be admitted as long as certain "safeguards" can be established, relying on Harding and its progeny; the defendant, in turn, invoked Frye. The state argued that Frye is inapplicable to evidence that is not the direct product of a mechanical device such as a lie detector; and to be admissible, the testimony of a previously hypnotized witness need not be true provided it is based on what the witness actually perceived. Stressing the potentially drastic effect of hypnosis on a witness' testimony, however, the court ruled that "Although hypnotically-adduced 'memory' is not strictly analogous to the

results of mechanical testing, we are persuaded that the Frye rule is equally applicable in this context" (id. at p. 768).26/

The court turned to the record to determine whether, under Frye, the use of hypnosis to refresh a witness' memory has been generally accepted as reliable by the scientists working in the field. The court found that the exact opposite is true, i.e., that the consensus of informed expert opinion rejects the use of hypnosis for this purpose because it is "not scientifically reliable as accurate." (Id. at p. 768.)

The court gave a number of reasons for this conclusion, each drawn

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26/ Echoing scholarly criticism, the court rejected Harding on the ground that it was the product of gullible witnesses and courts uninformed about the scientific realities of hypnosis. (Id. at pp. 770-771.)

from the expert testimony before it. (Id. at p. 768.) First, a "hypnotized subject is highly susceptible to suggestion, even that which is subtle and unintended. Such suggestion may be transmitted either during the hypnotic session or before it," by such persons as police officers or doctors. This suggestibility is enhanced by the subject's natural "desire to please either the hypnotist or others who have asked the person hypnotized to remember and who have urged that it is important that he or she remember certain events."27/ The result is that "hypnosis can create a memory of perceptions which neither were nor could have been made" (id. at p. 769).

27/ It is also enhanced by the subject's psychological "need to 'fill gaps.' When asked a question under hypnosis, rarely will he or she respond, 'I don't know.'" (Id. at p. 768.)

And "Most significantly, there is no way to determine from the content of the 'memory' itself which parts of it are historically accurate, which are entirely fanciful, and which are lies." (Id. at pp. 768-769.)

The expert testimony also supported the defendant's claim of denial of effective cross-examination: "In addition to its historical unreliability, a 'memory' produced under hypnosis becomes hardened in the subject's mind. A witness who was unclear about his 'story' before the hypnotic session becomes convinced of the absolute truth of the account he made while under hypnosis. This conviction is so firm that the ordinary 'indicia of reliability' are completely erased, . . . It would be impossible to cross-examine such a witness in any meaningful way." (Fn. omitted; id. at p. 769.)

Summing up, the court recognized but declined to perpetuate the two inconsistent lines of cases discussed hereinabove (Parts II A and II B, ante): "We follow the best scientific authority, however, in rejecting as artificial and unprincipled any distinction between hypnotically-induced testimony offered by the defense to exculpate and that offered by the prosecution to make its case. Regardless of whether such evidence is offered by the defense or by the prosecution, a witness whose memory has been 'revived' under hypnosis ordinarily must not be permitted to testify in a criminal proceeding to matters which he or she 'remembered' under hypnosis." (Id. at p. 771.)[28/]

28/ The court added that hypnosis could continue to be used as an investigative tool, i.e., to help a subject remember verifiable facts that can serve as "leads" for further investigation of

Because the precise question certified to the Minnesota Supreme Court in Mack was limited to the admissibility of a previously hypnotized witness' testimony on the subject matter of the hypnotic session, the court did not resolve the larger question whether such a witness should be allowed to testify on other matters relating to the crime that were not expressly covered in the hypnotic session and were allegedly recalled without

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(Fn. 28 Continued)

the crime -- such as a license plate number -- "as long as the material remembered during hypnosis is not subsequently used in court as part of an eyewitness' testimony." (Ibid.) The court warned, however, that even when a witness is hypnotized for the investigative purpose alone, the session must be conducted under safeguards adequate "to assure the utmost freedom from suggestion" in the event the witness is later called to testify to "recollections recorded before the hypnotic interview." (Italics added; ibid.) In a footnote at this point the court "note[d], without adopting," the safeguards recommended by Dr. Orne. (See fn. 21, ante.)

the aid of hypnosis. The latter question was soon answered, again in the negative.

In People v. Tait (Mich. App. 1980) 297 N.W.2d 853, the defendant was charged with assaulting Deputy Sheriff Myers with intent to commit murder. At the preliminary hearing Myers testified that the defendant approached him, raised a pistol, and twice threatened to blow his head off; when the defendant ignored his orders to stop and came nearer, Myers shot him. At trial Myers told the same story, with one difference: whereas at the preliminary hearing he had testified that he did not see the defendant attempt to fire the pistol, at trial he testified that just before he shot the defendant he saw the latter move his hand to the top of the weapon. Defense counsel moved for a mistrial, stating he had not learned that Myers' memory had been refreshed by pretrial hypnosis until he so

testified. The hypnotist had been the prosecuting attorney. Myers claimed that at the hypnotic session no one told him what to say, and that his trial testimony was his own recollection of the incident. The trial court denied the motion, and the defendant was convicted.

Reversing the judgment, the Michigan court began by recalling its 1978 decision in Hangsleben, supra, which held similar testimony inadmissible. The People argued that the Frye rule was inapplicable in this context because the witness' recollection was merely "refreshed" as permitted by law. The court rejected this contention, warning that "Investigatory use of hypnosis on persons who are later called on to testify in court carries a dangerous potential for abuse." (Id. at p. 656.) The court then held the case governed by the Michigan version of the Frye rule, to wit, that "general

scientific recognition [must] be established by testimony of disinterested and impartial experts or disinterested scientists whose livelihood was not intimately connected with the technique. [¶] In the instant case the technique is not new, but we believe the same requirements must be met as are required for the introduction of lie detector or voicewriter evidence or evidence influenced by them." (Id. at p. 857.) Applying that test, the court held (ibid.) that "Hypnosis has not 'achieved that degree of general scientific acceptance' which will permit its introduction," citing inter alia our decision in People v. Kelly (1976) 17 Cal.3d 24.

The question of disposition remained. The Frye error, noted the court, was compounded by the prosecution's failure to disclose before trial the fact that the witness had been hypnotized to

restore his memory. The court then concluded, "By virtue of the prosecutor's improper actions in this case, deputy sheriff Kirk Myers' testimony has been damaged to the extent that it cannot be used on retrial of the case. In lieu of discharge, the case is remanded for retrial, but the prosecution shall be absolutely prohibited from in any way using any testimony of deputy sheriff Myers. The trial court is adjured to permit no testimony of any kind as to what Myers may have seen or heard." (Italics added; 297 N.W.2d at p. 857.)

Any inference, however, that prosecutorial impropriety is a precondition to exclusion of the entire testimony of a previously hypnotized witness was firmly dispelled in the recent Arizona case of State v. Mena. There Stephen Koors was stabbed outside a bar by three men. Sometime later he

went with a police officer to see two doctors who hypnotized him for the purpose of improving his memory of the assault. The doctors questioned him about the incident, and his answers contained more details than the statements he had previously given to the police. Before terminating the session the doctors told him that after he came out of hypnosis he would remember what he had related to them in the trance. At trial, the defendant moved to exclude Koors' testimony unless it could be shown that his memories of the event were his own recollection and not implanted by suggestions of the hypnotists. The motion was denied and the defendant was convicted.

At the first level of review the Arizona Court of Appeal affirmed the judgment, relying of the "respectable authority" of Harding and its progeny to find no fundamental error. (State v. Mena (Ariz.

App. 1980) 624 P.2d 1292, 1294.) Declining in effect to apply the Frye rule, the court reasoned that "hypnotically adduced evidence cannot be equated with, for example, the results of a lie detector examination since one can cross-examine the witness but cannot cross-examine the lie detector." (Ibid.)

On further review, however, the Arizona Supreme Court rejected both the authority and the reasoning of the court of appeal, vacated the portion of its opinion dealing with hypnosis, and reversed the assault conviction. (State v. Mena (Ariz. 1981) 624 P.2d 1274.) The heart of its decision is a careful inquiry into the scientific realities of hypnosis and its effect on potential witnesses. In that inquiry the court relied on a number of scholarly articles as support for conclusions identical to those drawn in Mack from expert testimony: i.e.,

persons under hypnosis are prone to experience false memories, fantasies, and confabulations; these distortions are aggravated by the subject's tendency to respond in the way he believes the hypnotist desires, even without the awareness of either; the subject is unable to distinguish his true memories from pseudomemories implanted during hypnosis; and after hypnosis he will often be more convinced of the accuracy of the latter than the former, making cross-examination ineffective. (Id. at pp. 1276-1278.) On these grounds the court discredited Harding and its progeny, and instead quoted with approval from the above-discussed opinion in Tait.

The court then reiterated the Arizona version of the Frye rule (citing inter alia People v. Kelly (1976) supra, 17 Cal.3d 24), and stated, "We believe that the same standard should apply to the use

of hypnosis to produce testimony by purportedly improving memory." (624 P.2d at p. 1279.) Applying the rule in this context, the court found that although hypnosis has certain approved therapeutic uses, its use "to aid in accurate memory recall is not yet generally accepted." (Ibid.) Reaffirming the holding of its 1980 decision in La Mountain, supra, the court therefore concluded (ibid.): "The determination of the guilt or innocence of an accused should not depend on the unknown consequences of a procedure concededly used for the purpose of changing in some way a witness' memory. Therefore, until hypnosis gains general acceptance in the fields of medicine and psychiatry as a method by which memories are accurately improved without undue danger of distortion, delusion or fantasy, we feel that testimony of witnesses which

has been tainted by hypnosis should be excluded in criminal cases."

In the course of its opinion the court quoted the published view of Dr. Bernard L. Diamond that a witness who has been hypnotized for the purpose of improving his memory is so contaminated that he is thereafter incompetent to testify. (Id. at p. 1277.) In its disposition the court adopted that view and the corresponding holding of Tait, ruling that after Koors had been hypnotized it was prejudicial error to allow him to testify at all. The court explained (at p. 1280) that "it will often be difficult to determine whether proferred testimony has been produced by hypnosis or has come from the witness' own memory, unaffected by hypnotic suggestion. In order to ensure against the dangers of hypnosis, therefore, this Court will consider testimony from witnesses who have been questioned under

hypnosis regarding the subject of their offered testimony to be inadmissible in criminal trials from the time of the hypnotic session forward." (Italics added.) In a footnote at this point the court recognized that "our decision today may place the state in the difficult position of choosing whether to use a particular witness' testimony at a criminal trial or to subject that witness to hypnotism as an investigatory tool. We do not pass at this time on the state's ability to preserve a witness' prehypnotic testimony" by means of deposition.

With the next case in this series, we come full circle. As we have seen, the sequence began in 1968 with the decision of the Maryland Court of Special Appeals in Harding; but in Polk v. State (Md. App. 1981) 427 A.2d 1041, the same court has now repudiated Harding and held instead that Frye governs the question before us. This

dramatic turn of events would appear to give the coup de grace to the moribund precedent relied on here by the Attorney General.

In Polk the defendant was charged with orally copulating an eight-year-old boy named Bobby, his next-door neighbor. Some five months after the incident Bobby was taken to the state police barracks to be hypnotized by Sergeant White, a police investigator with minimal experience in hypnosis.[29/] Before the session began White was advised that the goal was to determine whether Bobby could remember any sexual contact with this defendant. Bobby's mother and the prosecuting attorney were present during the session.

29/ White's training in hypnosis consisted in attending a two-day seminar by a psychologist and reading three books on hypnotism. Prior to the incident in Polk he had hypnotized only two other persons for investigative purposes, and he had never qualified as a hypnosis expert in any court.

Under White's questioning, Bobby produced details of the alleged misconduct. The defendant moved before trial to suppress the testimony of Bobby and White on the ground that it would be the product of "an inexact and unproven science" and hence was inadmissible as a matter of law. Counsel also contended that White was not qualified as a hypnosis expert, his questions to Bobby were improperly suggestive, and there was an impermissible delay between the incident and the hypnotic session. The trial court denied the motion, asserting that the fact of hypnosis goes to the weight rather than the admissibility of the testimony. This, of course, was the rule in Maryland since Harding.

Bobby's testimony at trial was substantially the same as the answers he gave under hypnosis. On cross-examination he stated he had no recollection of the

incident and "forgot the nasty part" until he spoke with White. The prosecution did not call White, however, and did not introduce evidence of the hypnosis. For that reason the court refused to allow a defense expert to testify that hypnotically refreshed recollection is unreliable and White's hypnotic procedure was improper. The defendant's motions to strike Bobby's testimony and for acquittal or mistrial were denied, and he was convicted.

The appellate court acknowledged that Bobby's testimony would have been admissible under its 1968 decision in Harding, but held that decision had been undermined 10 years later when Maryland first adopted the Frye rule in the case of Reed v. State (Md. 1978) 391 A.2d 364. The court in effect distinguished away Harding on the following rationale: "In Harding, we did not assess the Frye principle, the rule there enunciated not

having been applied in this State until Reed; nor did we have occasion to probe the question -- here directly raised on the authority of Reed -- of the general acceptability of hypnotism as a reliable technique for memory retrieval within the relevant scientific community." (Fns. omitted; 427 A.2d at p. 1047.)30/

To answer that question, the court quoted at length from both Mack and Mena (and cited Tait as being in accord), stressing their reliance on the Frye rule in judging the admissibility of hypnotically refreshed recollection. The court then reasoned (id. at p. 1048): "Reed speaks, of course, of expert testimony based upon the use of a scientific technique. The technique of hypnosis is scientific,

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30/ Only the year before the same court had rejected the same argument, i.e., that the Reed-Frye rule undermined Harding. (State v. Temoney (Md. App. 1980) 414 A.2d 240, 244.)

but the testimony itself of the witness is the end product of the administration of the technique. The induced recall of the witness is dependent upon, and cannot be disassociated from, the underlying scientific method. Accordingly, we conclude, as did the Minnesota and Arizona Courts, that the Frye test must be applied in the instant case, i.e., before Bobby's testimony can be admitted, there must be a determination of whether hypnosis is generally acceptable in the relevant scientific community for the purpose of memory retrieval."

Because that determination had been precluded below by the refusal to allow the defendant to prove the unreliability of hypnosis, the court reversed and remanded with directions to the trial judge to rule in the first instance on the general acceptability of this technique as shown by expert testimony and scholarly

publications. Finally, adopting the Mena rule of total disqualification of any witness thus contaminated, the court also directed that if the technique is found inadmissible under Frye, Bobby must not be allowed to testify at all on the retrial "since the boy had no recollection of the alleged incident giving rise to the charges against the appellant prior to the hypnosis. State v. Mena, supra." (Id. at p. 1049.)

In Commonwealth v. Nazarovitch (1981) 436 A.2d 170, the Supreme Court of Pennsylvania not only joined the foregoing line of decisions barring hypnotically induced testimony, but expressly refused to follow Hurd in its attempt to sanitize such evidence by procedural "safeguards." The defendants in Nazarovitch were charged with murder on the basis of statements by a witness whom the police had caused to be hypnotized on three occasions prior to

trial in an effort to refresh her memory of the event. Law enforcement officials were present during each hypnotic session, and furnished some of the questions asked of the witness. The defendants' pretrial motion to suppress the witness' testimony was granted, and the prosecution appealed.

In a unanimous opinion, the Pennsylvania high court held such testimony inadmissible and affirmed the suppression order. The court began by ruling that the admissibility of the challenged testimony must be judged by the Frye test, i.e., "whether hypnotically-refreshed testimony is generally accepted in the scientific community as yielding reasonably reliable results." (Id. at p. 173.) As in Mena, the court answered the question by examining the published views of leading representatives of that community. From such studies the court concluded, as in both Mena and Mack, that the scientific

community has "grave misgivings" about the reliability of hypnosis in forensic use, for a number of reasons inherent in the phenomenon itself: i.e., "the heightened suggestivity, the increased desire to satisfy the hypnotist, the tendency to confabulate, and the inability to distinguish in one's waking state the fact from the fantasy" (id. at p. 174). "Furthermore," the court observed, "the hypnotic subject, upon awakening, is often imbued with a confidence and conviction as to his memory which was not present before. Prehypnosis uncertainty becomes molded, in light of additional recall experienced under hypnosis, into certitude, with the subject unaware of any suggestions that he acted upon or any confabulation in which he engaged. The subject's firm belief in the veracity of his enhanced recollection is honestly held, and cannot be undermined through cross-examination." (Ibid.)

The court then carefully reviewed the reasoning and holding of its sister state in Hurd, but refused to accede to the urging of the prosecution that it adopt such an approach in Pennsylvania. Rather, the court explained, "we remain unconvinced that the trier of fact could do anything more than speculate as to the accuracy and reliability of hypnotically-refreshed memory. The Hurd court's rationale that hypnotically-refreshed recollection might as well be admissible since ordinary eyewitness accounts are also vulnerable to error and inaccuracies does not do full justice to the fact that 'the traditional guaranties of trustworthiness as well as the jury's ability to view the demeanor of the witness are wholly ineffective to reveal distortions of memory induced by the hypnotic process.' [Citation.] It is unchallenged that a jury can more critically analyze a

witness' ability to perceive, remember, and articulate his recollections when such testimony has not been hypnotically-refreshed. The probative worth of the hypnotically-adduced evidence cannot overcome the serious and fundamental handicaps inherent therein." (Id. at pp. 176-177; accord, State of Arizona ex rel. Collins v. Superior Court (1982) ___ P.2d ___.)

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III

From the foregoing cases it appears that the correct analysis of the problem before us is to determine whether hypnotically recalled testimony is subject to the California version of the Frye rule, and if so, whether it meets the test of that rule. We proceed to such an analysis.

IV

The Frye rule is deeply ingrained in the law of this state. It has repeatedly been invoked by our courts to determine the admissibility of evidence based, for example, on polygraph examinations (People v. Wochnick (1950) 98 Cal.App.2d 124, 127-128), "truth serum" (People v. Jones (1959) 52 Cal.2d 636, 653), Nalline testing (People v. Williams (1958) 164 Cal.App.2d Supp. 858, 860-862, experimental systems of blood typing

(Huntingdon v. Crowley (1966) 64 Cal.2d 647, 653-656), voiceprint analysis (People v. Kelly (1976) supra, 17 Cal. 3d 24), human bite marks (People v. Slone (1978) 76 Cal.App.3d 611, 623-625), and microscopic identification of gunshot residue particles (People v. Palmer (1978) 80 Cal.App.3d 239, 250-255). We recently reviewed the several reasons for this rule in Kelly (17 Cal.3d at pp. 31-32), and need not repeat them here; it is enough to note our conclusion (id. at p. 32) that "we are persuaded by the wisdom of, and reaffirm our allegiance to, the Frye decision and the 'general acceptance' rule which that case mandates."

The Attorney General contends the Frye rule is inapplicable in the present context, making in essence the following argument: The rule is assertedly limited to cases in which

(1) an expect witness gives his opinion (2) interpreting the results of a new technique for scientifically testing or analyzing physical evidence, and (3) that opinion goes directly to the existence or nonexistence of a disputed fact, which is often the ultimate issue in the litigation. By contrast, in cases such as the present it is not the expert (i.e., the hypnotist) who ordinarily testifies the process involved (i.e., the hypnotizing of a potential witness to improve his recall) has nothing to do with testing physical evidence; if the expert does testify, he should not be asked to interpret the results of the technique (i.e., to give his opinion on whether the revived memories of the hypnotized subject are true) but simply to discuss its methodology (i.e., to explain how the hypnotic session was

conducted); and the latter testimony evidently does not go the disputed fact or ultimate issue (e.g., the identity of the culprit). Rather, in the typical case the witness is the person who actually perceived the event that is the subject of the litigation, and his testimony is the same as that of any other lay witness, i.e., he states his present recollection of that event to the best of his ability. It is true that his recollection has been refreshed by hypnosis, and that hypnosis does not guarantee truthful or accurate recall. But neither does any other method of reviving memory. That guarantee, as with all witnesses, comes from cross-examination, which permits the trier of fact to determine the truth

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and accuracy of the hypnotically refreshed testimony.[31/]

The argument is unpersuasive for a number of reasons. First, it proceeds from an unduly narrow reading of the opinions invoking the Frye rule: as we said in Kelly, for example, the rule applies to evidence "developed by" or "based upon" new scientific techniques. (17 Cal.3d at p. 31.) Nor are those techniques necessarily limited to manipulation of physical evidence: we do not doubt that if

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31/ On the assumption that Frye is inapplicable, the Attorney General contends the only issue is whether the use of hypnosis in this case was an impermissibly suggestive pretrial procedure that tainted Catherine's subsequent testimony, citing the Wade-Neil rule. (United States v. Wade (1967) 388 U.S. 218; Neil v. Biggers (1972) 409 U.S. 188.) Finding that defendant did not sustain his burden of proof under that rule, the Attorney General concludes the testimony was admissible.

testimony based on a new scientific process operating on purely psychological evidence were to be offered in our courts, it would likewise be subjected to the Frye standard of admissibility. In either case, the rule serves its salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods. (Kelly, at pp. 31-32.)

Moreover, from the unchallenged expert testimony in the case at bar and the uniform findings of the jurisdictions that have inquired into the matter, it appears that hypnotizing a witness to improve his memory is not in fact like "any other method" of refreshing a witness' recollection. These sources reveal that the hypnotic process does more than permit the witness to retrieve real

but repressed memories; it actively contributes to the formation of pseudo-memories, to the witness' abiding belief in their veracity, and to the inability of the witness (or anyone else) to distinguish between the two. In these circumstances, as noted above, the resulting recall of the witness "is dependent upon, and cannot be dis-associated from" the underlying hypnosis. (Polk v. State (Md. App. 1981) supra, 427 A.2d at p. 1048.) And if the testimony is thus only as reliable as the hypnotic process itself, it must be judged by the same standards of admissibility.

The question has in any event been decided in California. In People v. Diggs (1980) 112 Cal.App.3d 522, the court held Kelly applicable in this context on essentially the same reasoning: "In view of the modification

of memory and demeanor which generally follow from treatment by hypnosis, we are persuaded that posthypnotic testimony may in many instances properly be termed a product of the technique. The admissibility of evidence based upon a new scientific technique is governed by People v. Kelly . . . . [¶] The Kelly court was concerned with and sought to mitigate the dangerous tendency of lay jurors to give considerable and often undue weight to scientific evidence presented by experts with impressive credentials. (17 Cal.3d, at p. 31.) Such procedures are invested with a '"misleading aura of certainty which often envelops a new scientific process, obscuring its currently experimental nature."' (17 Cal.3d, at p. 32.) This is certainly true of hypnosis."

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(112 Cal.App.3d at pp. 530-531.) We approve this portion of Diggs.[32/]

In accord, therefore, with the courts of Michigan, Minnesota, Arizona, Maryland, and Pennsylvania, we hold that in this state the testimony of witnesses who have undergone hypnosis for the purpose of restoring their memory of the events in issue cannot be received in evidence unless it satisfies the Frye standard of admissibility.

32/ In Diggs the Court of Appeal went on to hold, however, that on the record before it "there was an adequate showing to establish the admissibility of [the witness'] posthypnotic testimony under Kelly" (id. at p. 531). This appears to be a misreading of the requirements of Kelly, and therefore of Frye. According to the Court of Appeal, the psychiatrist who hypnotized the witness gave as his opinion that hypnotically enhanced testimony is reliable, while Dr. Bernard Diamond gave a contrary opinion, "bolstered by the introduction of several corroborating affidavits by other experts in the field." (Id. at p. 530.) The court nevertheless deemed this conflict immaterial, reasoning that "Dr. Diamond's

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It is the proponent of such testimony, of course, who has the burden of making the necessary showing of compliance with Frye, i.e., of

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(Fn. 32 continued)

testimony to the contrary, it seems that the lower court here was presented with sufficient evidence of the reliability of the method used" (id. at p. 531). Thus the court apparently believed that Kelly-Frye is satisfied whenever there is "sufficient evidence" from which the trial court could find that hypnotic memory enhancement is reliable -- and under normal rules of proof the testimony of one witness is enough for this purpose, despite contradictory testimony. (See Evid. Code, § 411.)

Yet the Kelly-Frye requirement is not fulfilled merely by evidence that one expert personally believes the challenged procedure is reliable; the court must be able to find that the procedure is generally accepted as reliable by the larger scientific community in which it originated. (Kelly, at pp. 30-32, 37.) It is obvious that no such finding could be made on the record in Diggs. To that extent, accordingly, the decision is disapproved.

demonstrating by means of qualified and disinterested experts that the new technique is generally accepted as reliable in the relevant scientific community. (Kelly, at pp. 36-40.) In the case at bar the prosecution did not take up that burden, and made no such showing. On this ground alone we would ordinarily be justified in holding the challenged testimony inadmissible. But while such a ruling would dispose of the appeal before us, it would provide the bench and bar with little guidance in other litigation presenting the same questions. Moreover, in the particular circumstances of this case the prosecution had little if any opportunity to make the required showing.[33/] We therefore reach the Frye

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33/ At the time of trial (June 1979) neither Diggs nor the leading out-of-state cases applying Frye in

issue on its merits, both for reasons of precedent and considerations of fairness.

Yet it does not follow, as the Attorney General claims, that the record is inadequate to support a decision on the general admissibility of hypnotically aided testimony. Here the issue was fully raised by defendant. Not only did he make a timely pretrial motion on this

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(Fn. 33 continued)

this context had yet been decided. The prevailing rule in other jurisdictions was still that of Harding and its progeny, i.e., the fact of hypnosis "goes to the weight, not the admissibility" of the testimony. As we have seen, the trial court expressly relied on that rule in denying defendant's motion to exclude the post-hypnotic testimony of the complaining witness. Believing that only credibility was in issue, the court refused to allow the prosecution to open up the subject of hypnosis in its case-in-chief.

ground, but on cross-examiantion of Catherine he probed critically into the purpose, method, and results of her hypnotic experience. By the testimony of Dr. Schafer, defendant then exposed the multiple risks in using hypnosis to restore a witness' memory; and he elicited from Dr. Schafer an unequivocal expert opinion that hypnosis is not reliable as a truth-seeking technique.

To be sure, in Kelly we doubted whether the testimony of a single witness, even if qualified, is sufficient to establish the views of an entire scientific community as to the reliability of a new procedure. (17 Cal.3d at p. 37.) As will appear, however, Dr. Schafer's testimony is supported by a substantial body of scholarly treatises and articles on the subject. The Attorney General complains

that "literature is not evidence," and that it would be improper for this court to "pick and choose among that literature to decide issues of scientific fact." The remark betrays a fundamental misunderstanding of the task before us: our duty is not to decide whether hypnotically induced recall of witnesses is reliable as a matter of "scientific fact," but simply whether it is generally accepted as reliable by the relevant scientific community. We recognized in Kelly (ibid.) that "Ideally, resolution of the general acceptance issue would require consideration of the views of a typical cross-section of the scientific community, including representatives, if there are such, of those who oppose or question the new technique." But considerations of judicial economy make it impractical to require those views to

be presented personally by each scientist testifying in open court: as pointed out in Mack (292 N.W.2d at p. 766), such a procedure would be prohibitively expensive, and would be frustrated in any event by the difficulty of finding local experts qualified to testify on hypnosis as an investigative rather than a therapeutic tool.

Accordingly, for this limited purpose scientists have long been permitted to speak to the courts through their published writings in scholarly treatises and journals. (Kelly, at p. 35; Huntingdon v. Crowley (1966) supra, 64 Cal.2d 647, 656; People v. Palmer (1978) supra, 80 Cal.App.3d 239, 252-254; People v. Law (1974) 40 Cal.App.3d 69, 75; United States v. Addison (D.C. Cir. 1974) 498 F.2d 741, 744-745.) The courts view such writings as "evidence," not of the

actual reliability of the new scientific technique, but of its acceptance vel non in the scientific community. Nor do the courts "pick and choose" among the writings for this purpose. On many topics -- including hypnosis -- the scientific literature is so vast that no court could possibly absorb it all. But there is no need to do so, because the burden is on the proponent of the new technique to show a scientific consensus supporting its use; if a fair overview of the literature discloses that scientists significant either in number or expertise publicly oppose that use of hypnosis as unreliable, the court may safely conclude there is no such consensus at the present time.

That is the case before us. On the topic of hypnotically aided recall we have reviewed numerous

scientific treatises and articles in scholarly journals.[34/] From this review

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34/ We have also reviewed, but given little weight to, law review articles on this topic by authors who are exclusively members of the legal profession. A number of such articles are cited in State v. Mack (Minn. 1980) supra, 292 N.W.2d 764, 765, footnote 4, and are discussed and criticized in Diamond, Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness (1980) 68 Cal.L.Rev. 313, 327-331 (hereinafter cited as Diamond, Inherent Problems). As Dr. Diamond concludes, the articles suffer generally from an underestimation of the scientific risks in using hypnosis to restore a witness' memory, and an overestimation of the ability of traditional legal devices (e.g., expert testimony, cross-examination) to avoid those risks. It appears as true of hypnosis as of voiceprint analysis that "This area may be one in which only another scientist, in regular communication with other colleagues in the field, is competent to express such an opinion [as to the view of the scientific community]. . . . In considering the position of the scientific community, a court is bound to let scientists speak for themselves." (Kelly, at pp. 39-40 of 17 Cal.3d.)

it clearly appears that major voices in the scientific community oppose the use of hypnosis to restore the memory of potential witnesses, with or without procedural safeguards, on the ground of its intrinsic unreliability. This unreliability is due both to certain properties of human memory and to factors inherent in the nature of hypnosis. We begin with the former, which have been little mentioned in the cases.

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The principal proponent of hypnotically aided recall is a police department psychologist, Martin Reiser, Ed.D.[35/] According to his

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35/ Dr. Reiser is the director of behavorial science services of the Los Angeles Police Department. He is also the director of the Law Enforcement Hypnosis Institute, a proprietary school in Los Angeles that teaches courses in hypnotism to police and other law enforcement personnel.

published writings, Dr. Reiser operates on the belief that human memory is like a videotape machine that (1) faithfully records, as if on film, every perception experienced by the witness, (2) permanently stores such recorded perceptions in the brain at a sub-conscious level, and (3) accurately "replays" them in their original form when the witness is placed under hypnosis and asked to remember them. (See, e.g., Reiser, Handbook of Investigative Hypnosis (1980), ch. 40; Reiser, Hypnosis as a Tool in Criminal Investigation [Nov. 1976] The Police Chief 36, 40; Reiser, Hypnosis as an Aid in a Homicide Investigation (1974) 17 Am.J. Clinical Hypnosis 84, 85.) With minor variations, this belief -- or assumption -- is apparently shared by police psychologists and "hypno-technicians" at all levels of law

enforcement, and serves as the theory on which such personnel base their practice of hypnotizing potential witnesses to improve their recall of crime-related events.

The professional literature, however, rejects this belief: the scientists who work in the field generally agree that, as Dr. Schafer testified at trial, the memory does not act like a videotape recorder, but rather is subject to numerous influences that continuously alter its content. This view has been expressed at least since the pioneer study of Sir Frederic C. Bartlett of Cambridge University, published a half-century ago. (Bartlett, Remembering (1932, reprinted 1964).) Using a different simile in that pretelevision era, Bartlett critically examined the conventional belief of his time that "traces" of

every event were laid down in the mind and permanently stored until they were "re-excited" by a stimulus and reappeared as memories. Bartlett began his analysis by pointing out that "there are obvious difficulties. The traces are generally supposed to be of individual and specific events. Hence, every normal individual must carry about with him an incalculable number of individual traces. Since these are all stored in a single organism, they are in fact bound to be related one to another, and this gives to recall its inevitably associative character" (id. at p. 203).

Less obvious but even more important was Bartlett's now-famous conclusion, drawn from his experimental work, that memory is productive rather than reproductive: "The first notion to get rid of is that memory is primarily or literally reduplicative, or

reproductive. . . . In fact, if we consider evidence rather than presupposition, remembering appears to be far more decisively an affair of construction rather than one of mere reproduction." (Id. at pp. 204-205.) As had often been shown, "condensation, elaboration and invention are common features of ordinary remembering" (id at p. 205). Expanding on the latter point, Bartlett reported that "our studies have shown us that all manner of changes in detail constantly occur in instances which every normal person would admit to be genuine instances of remembering. There are changes in order of sequence, changes of direction, of complexity of structure, of significance, . . ." (Id. at p. 312.) In summary, "Remembering is not the re-excitation of innumerable fixed, lifeless and fragmentary traces. It is an imaginative reconstruction, or

construction, built out of the relation of our attitude towards a whole active mass of organized past reactions or experience . . . ." (Id. at p. 213.)

Bartlett's insight that "the past is being continually re-made, reconstructed in the interests of the present" (id. at p. 309) prevailed in due course among his colleagues, and is now the generally accepted view of the profession. Of the many works that support this view, we shall discuss but two as examples. In his analysis of the "permanent memory" hypothesis, Professor Douglas L. Hintzman observes that "Before even considering the relevant data, we can see a number of reasons for thinking that true forgetting does occur. Throughout our adult lives brain cells die and are not replaced. Even those that survive undergo continual change. There is a

constant 'turnover' of the chemicals that make them up, just as there is in other parts of the body. And as we deal with our changing environment, it seems likely that we encode many new experiences by modifying trace structures originally developed to deal with old ones." (Hintzman, The Psychology of Learning and Memory (1978) p. 298.) He then examines the two phenomena most often cited as "evidence" for the permanent memory hypothesis.

The first is the work of Wilder Penfield, a neurosurgeon who has performed numerous brain operations on patients with advanced cases of epilepsy. In the course of those operations Penfield discovered that when he stimulated various locations in the brain with an electric probe, the patients -- who were conscious during the procedure -- reported experiencing

vivid and detailed "flashbacks" reminding them of events that assertedly occurred in their childhood. To explain those reports, Penfield proposed a model of memory very similar to the "videotape recorder" theory espoused by the police psychologists.[36/] Professor Hintzman points out several serious objections to Penfield's conclusions. First, on some occasions the patients report that they experience not a "memory" but a dream or a hallucination, or simply a feeling

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36/ Dr. Reiser, for example, accepts Penfield's evidence at face value, and relates without question the latter's somewhat extravagant conclusion that "the brain functions much like a high fidelity recorder, putting on tape, as it were, every experience from the time of birth, possibly even before birth, and that these experiences and associated feelings are available for replay today in as vivid a form as when they first occurred." (Italics added; fn. deleted.) (Reiser, Handbook of Investigative Hypnosis (1980) p. 8.)

of deja vu. (Id. at p. 301.) It is difficult if not impossible to distinguish between these phenomena. Next, "There is never any independent verification of the reported 'memories' -- nothing to indicate the experience is really an event from the patient's past. There is only the subject's statement that it seems familiar, and therefore must be something that happened at an earlier time." (Id. at pp. 301-302.) As we shall see, this lack of independent verification infects most of the claimed "evidence" of reliable hypnotic recall. Finally, "such reports have not been obtained from non-epileptic patients" (id. at p. 302), and hence form a scientifically inadequate basis for drawing conclusions about the memory processes of the largy majority of the population.

The second phenomenon often cited as evidence for permanent memory is "hypnotic age regression." This is the procedure by which, under hypnotic suggestion, a subject appears to regress in mental age until an earlier date in his life, then seems to "relive" the events he experienced on that date and their accompanying emotions. Again Professor Hintzman finds little persuasive value in such demonstrations, stressing that the subject's claim to recall specific individuals or events from his childhood is rarely if ever corroborated because of obvious difficulties in doing so. He also notes studies in which hypnotized subjects have instead undergone age "progression" -- i.e., have been made to believe they are living 10 or more years in the future -- and have reported their future "memories" with equal conviction

and verisimilitude. "Good hypnotic subjects," the author explains, "will go to great lengths to comply with the hypnotist's requests, and this apparently includes constructing realistic scenarios and acting them out." (Id. at p. 303.) Professor Hintzman concludes that while the permanent memory hypothesis is tantalizing in its simplicity, the evidence offered in its support is weak and the hypothesis is probably incorrect. (Id. at p. 304.) 37/

Elizabeth F. Loftus, Ph.D., a highly experienced investigator in the field of memory, reaches similar conclusions in a number of her articles (e.g., Loftus & Loftus, On the

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37/ A leading scientific study is in accord. (O'Connell, et al., Hypnotic Age Regression: An Empirical and Methodological Analysis (Dec. 1970) 76 J. Abnorm. Psych. (monograph supp. pt. 2).)

Permanence of Stored Information in the Human Brain (1980) 35 Am. Psychologist 409) and in her valuable treatise, Eyewitness Testimony (1979). Adopting a different simile, she explains in the latter that "During the time between an event and a witness' recollection of that event -- a period often called the 'retention interval' -- the bits and pieces of information that were acquired through perception do not passively reside in memory waiting to be pulled out like fish from water. Rather, they are subject to numerous influences. External information provided from the outside can intrude into the witness' memory, as can his own thoughts, and both can cause dramatic changes in his recollection." (Id. at pp. 86-87.) Her reasons for this view deserve close attention. On the basis of her research Dr. Loftus

identifies a number of the influences that can cause a memory to change during the retention interval without the witness' awareness: the witness may "compromise" the memory with a subsequently learned but inconsistent fact (id. at p. 56); he may "incorporate" into the memory a nonexistent object or event casually mentioned by a third party, e.g., in later questioning (id. at p. 60); post-event information may change the way the witness "feels" about the original incident, e.g., may affect his impression of how noisy or how violent it was (id. at pp. 70-72); because a witness is under great social pressure to be complete and accurate he may fill gaps in his memory by guessing, and thereafter "recall" those guesses as part of the

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memory;[38] and if the witness is subjected to repeated questioning, any erroneous statement he made early on may be "frozen into" the memory and reappear later as a fact (id. at pp. 84-86). There is no way to tell, moreover, whether any given detail recalled by the witness comes from his original perception or from external information that he subsequently acquired. (Id. at p. 78.)

From these studies Dr. Loftus has no doubt that postevent experiences can alter any witness' memory, subtly but irreversibly. The author then considers and rejects the permanent memory hypothesis. Observing that "People cling to highly suspicious

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38/ In language particularly relevant to the risks of hypnotically inducing recall through the "videotape recording" technique, Dr. Loftus adds:

evidence to support this belief" (id. at p. 115), she is particularly critical of the "evidence" allegedly provided by hypnotic age regression: "many investigators believe that hypnosis is unreliable and unpredictable, and is just as likely to create new memories as to recover old ones." (Ibid.) Dr. Loftus concedes it will never be possible to "prove" conclusively that a witness does not have an unaltered memory trace of a given event, for it can always be objected that the technique for unearthing it was inadequate -- i.e., that "we did not dig

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(Fn. 38 continued)

"while an initial guess may be offered with low confidence, later, when the witness mistakes the guess for a real memory, the confidence level can rise. This seems to occur because a witness is now 'seeing' an item that he himself has constructed in memory. (Id. at p. 82.)

deep enough." (Id. at p. 117.) Nevertheless, after careful investigation the author reports that "My colleagues and I have used a number of different techniques to try to induce such witnesses to reveal evidence of any traces of the original information. In all of these cases, we have been unable to provide any evidence that an intact original memory remains." (Italics added; id. at p. 118.)

The "videotape recorder" theory of law enforcement hypnotists also lacks empirical support for the third of its assumptions, to wit, that upon being unlocked by hypnosis the witness' repressed memories are "replayed" without further modification as he recalls the original event.[39/]

39/ The theory also lacks support for its initial assumption, i.e., that the witness is capable in the first

Once more the research results are otherwise: in this final stage of the process, known as "retrieval," the accuracy of the witness' memory may be adversely affected by outside factors even as he recalls it. Again Dr. Loftus identifies some of those influences as follows:

(Fn. 39 continued)

instance of "recording" his every perception of the original event with complete fidelity. Extensive work by memory investigators (including Dr. Loftus) demonstrates that in this stage of the process, known as "acquisition" or encoding," the witness is likewise subject to external and internal influences that tend to distort his perceptions at the very moment he experiences them. For present purposes, however, we need not discuss this phenomenon further: it occurs potentially in every witness, and has no immediate counterpart in the procedure of hypnotically aided recall.

the witness may subconsciously tailor his recall to conform to expectations implied by the person questioning him; those expectations may be conveyed, intentionally or not, either by such conduct of the questioner as tone of voice, emphasis, pauses, facial expression and other "body language" (id. at pp. 72-74), or by the particular method of interview used[40/] or precise form of question asked[41/] (id. at pp.

40/ The interrogatory method ("Did you see a gun?") produces recollections of lower accuracy but greater detail than the narrative method ("Tell me what you saw.").

41/ The classic distinction is between asking the witness, "Did you see a gun?" and asking him, "Did you see the gun?" Other semantic differences with significant effects on accuracy have been reported in the literature. (See, e.g., Hilgard & Loftus, Effective Interrogation of the Eyewitness (1979) 27 Internat. J. Clinical & Experimental Hypnosis 342, 346-351.)

90-94); and the witness may be more likely to respond to such cues if the questioner is a status figure (e.g., a doctor or a law enforcement official) than if he is merely a passerby inquiring what happened (id. at pp. 97-98).

Lastly, Dr. Loftus warns there is no clear correlation between the witness' confidence in the accuracy of his recall and its accuracy in fact: indeed, studies have shown that in some circumstances "people can be more confident about their wrong answers than their right ones. To be cautious, one should not take high confidence as any absolute guarantee of anything." (Id. at p. 101.) The final distorting influence on memory retrieval, then, is a well-documented phenomenon: "Most people, including eyewitnesses, are motivated by a desire to be correct, to

be observant, and to avoid looking foolish. People want to give an answer, to be helpful, and many will do this at the risk of being incorrect. People want to see crime solved and justice done, and this desire may motivate them to volunteer more than is warranted by their meager memory. The line between valid retrieval and unconscious fabrication is easily crossed." (Id. at p. 109.)[42/]

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We have dwelt on the reports of current research into the operation of human memory for two reasons. First, as we have seen, that research convincingly undermines the "videotape

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42/ Such motivation may be all the more powerful, of course, when the witness to the crime is also its victim. In that event the natural desire to see "justice done" may be fueled by a deeper yearning for vengeance.

recorder" theory on which most law enforcement hypnosis of potential witnesses is premised.[43] Second, each of the phenomena found by such research to contribute to the unreliability of normal memory reappears in a more extreme form when the witness is hypnotized for the purpose of improving his recollection.[44]

43/ On the basis of that research, for example, Dr. Orne flatly rejects the "videotape" model: "Suffice it to say that such a view is counter to any currently accepted theory of memory and is not supported by scientific data [citations]." (Orne, The Use and Misuse of Hypnosis in Court (1979) 27 Internat. J. Clinical & Experimental Hypnosis 311, 321 [hereinafter cited as Orne, Use and Misuse].) While he concedes that in working with the hypnotic subject the "videotape" imagery may at times be useful, he explains that "no competent hypnotherapist would, in using such a metaphor, confuse it with the manner in which memory is organized." (Id. at p. 325, fn. 7.)

44/ For this reason we cannot subscribe to the theory of Hurd (432 A.2d at p. 92) that however untrustworthy

We turn, then, to the professional literature on the latter topic. For present purposes we need not add to this already lengthy discussion by analyzing that literature in detail; it will be enough if we simply set forth its principal relevant conclusions, with citations to a representative sample of supporting studies. The conclusions will necessarily be oversimplified, but full

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(Fn. 44 continued)

hypnotically induced recall may be, it is at least no worse than ordinary memory if it is accompanied by six listed "safeguards." We explain above (Part II C, ante) why we find such "safeguards" both inadequate and impractical.

explanations of each point can be found in the cited authorities and similar works. 45/

45/ As will appear, the most persuasive spokesmen for the relevant scientific community are Drs. Diamond and Orne. Dr. Diamond, who is both Clinical Professor of Psychiatry and Professor of Law at the University of California, is well known to the legal profession. He is the author of numerous articles in the area of psychiatry and the law, and we have often relied on his views. (See, e.g., People v. Burnick (1975) 14 Cal.3d 306, 327, 328 & fn. 19, where we describe Dr. Diamond as "a nationally known specialist in this field.")

Martin T. Orne, M.D., Ph.D., is equally well known and respected by that segment of the medical profession specializing in the theory and practice of hypnosis. He is at once an investigator, a clinician, and an educator: director of the Unit for Experimental Psychiatry at the Institute of Pennsylvania Hospital, one of the nation's most active laboratories of hypnosis research, he is also senior attending psychiatrist at the same hospital and Professor of Psychiatry at the University of Pennsylvania. In addition, Dr. Orne is the president of the International Society of Hypnosis, the editor of the International Journal of Clinical anc Experimental Hypnosis, the senior author of the article on hypnosis in the Encyclopaedia Britannica

1. Hypnosis is by its nature a process of suggestion, and one of its primary effects is that the person hypnotized becomes extremely receptive to suggestions that he perceives as

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(Fn. 45 continued)

(see fn. 15, ante), and the author of leading articles on hypnosis research in the scholarly journals. He has often testified as an expert on hypnosis, and his eminence in the field has repeatedly been recognized in the published opinions. (See, e.g., State v. Mack (Minn. 1980) supra, 292 N.W.2d 764, 766; State v. Hurd (N.J. Super. 1980) 414 A. 2d 291, 296; People v. Hughes (N.Y. County Ct. 1979) supra, 417 N.Y.S.2d 643, 646.)

By relying primarily on Drs. Diamond and Orne, of course, we do not mean to denigrate the contributions of many other experts in hypnosis whose writings we have also consulted (e.g., Ernest R. Hilgard, Ph.D., director of the Stanford University laboratory of hypnosis research), some of whom we cite hereinafter. On the present issue, however, the majority are in full agreement with the essential findings and conclusions of Drs. Diamond and Orne.

emanating from the hypnotist. The effect is intensified by another characteristic of the hypnotic state, to wit, that the attention of the subject is wholly focused on and directed by the hypnotist. The suggestions may take the form of explicit requests or predictions by the hypnotist; or they may be inferred by the subject from information he acquired prior to or during the hypnotic session, or from such cues as the known purpose of that session, the form of questions asked or comments made by the hypnotist, or the hypnotist's demeanor and other nonverbal conduct. The suggestions can be entirely unintended -- indeed, unperceived -- by the hypnotist himself.[46/]

46/ Diamond, Inherent Problems, page 333; Orne, Use and Misuse, pages 322-327; Orne, On the Simulating Subject as a Quasi-Control Group in Hypnosis Research: What, Why, and How,

2. The person under hypnosis experiences a compelling desire to please the hypnotist by reacting positively to these suggestions, and hence to produce the particular responses he believes are expected of him. Because of this compulsion, when asked to recall an event either while in "age regression" or under direct suggestion of heightened memory ("hypermnesia"), he is unwilling to admit that he cannot do so or that his recollection is uncertain or incomplete. Instead, he will produce a "memory" of

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(Fn. 46 continued)

in Hypnosis: Research Developments and Prespectives (Fromm & Schor edits. 1972) pages 400-403 [hereinafter cited as Hypnosis Research]; Orne, The Nature of Hypnosis: Artifact and Essence (1959) 58 J. Abnorm. & Soc. Psych. 277, 280-286, 297; see generally Hilgard, Hypnotic Susceptibility (1965); Weitzenhoffer, Hypnotism: An Objective Study in Suggestibility (1953); Hull, Hypnosis and Suggestibility (1933).

the event that may be compounded of (1) relevant actual facts, (2) irrelevant actual facts taken from an unrelated prior experience of the subject, (3) fantasized material ("confabulations") unconsciously invented to fill gaps in the story, and (4) conscious lies -- all formulated in as realistic a fashion as he can.[47/] The likelihood of such self-deception is increased by another effect of hypnosis, i.e., that

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47/ In a recent California case, for example, the complaining witness underwent no less than four pretrial hypnotic sessions for the purpose of improving her memory of the crime. The sessions were conducted by a physician experienced in the use of hypnosis, and he was convinced that the witness was in fact hypnotized on each occasion. He was of the opinion, however, that the entire recollection produced by the witness while in the trance state was a deliberate lie. He explained that a hypnotized person "is able to lie, and will lie for the same reasons he would lie in a nonhypnotic condition." (People v. Lopez (1980) 110 Cal.App.3d 1010, 1017.) The Court of Appeal accepted this explanation, and

it significantly impairs the subject's critical judgment and causes him to give credence to memories so vague and fragmentary that he would not have relied on them before being hypnotized.[48/]

3. During the hypnotic session, neither the subject nor the hypnotist can distinguish between true memories

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(Fn. 47 continued)

concluded that "the hypnotic sessions were not instrumental in refreshing the victim's memory. On the contrary, throughout those sessions she continued to repeat a fabricated tale." (Id. at p. 1018.)

48/ Diamond, Inherent Problems, pages 335, 337-338; Orne, Use and Misuse, pages 316-320; Putnam, Hypnosis and Distortions in Eyewitness Testimony (1979) 27 Internat. J. Clinical & Experimental Hypnosis 437, 446; Gibson, Hypnosis: Its Nature and Therapeutic Uses (1977) pages 58-59; Shor, The Fundamental Problem in Hypnosis Research as Viewed From Historic Perspectives, in Hypnosis Research, pages 37-39; Hilgard, Hypnotic Susceptibility (1965) page 9; Hull, Hypnosis and Suggestibility (1933) pages 111-115.

and pseudomemories of various kinds in the reported recall; and when the subject repeats that recall in the waking state (e.g., in a trial), neither an expert witness nor a lay observer (e.g., the judge or jury) can make a similar distinction. In each instance, if the claimed memory is not or cannot be verified by wholly independent means, no one can reliably tell whether it is an accurate recollection or mere confabulation. Because of the foregoing pressures on the subject to present the hypnotist with a logically complete and satisfying memory of the prior event, neither the detail, coherence, nor plausibility of the resulting recall is any guarantee of its veracity.[49/]

49/ Diamond, Inherent Problems, pages 333-335, 337-338, 340; Orne, Use and Misuse, pages 317-318, 320; Spiegel,

4. Nor is such guarantee furnished by the confidence with which the memory is initially reported or subsequently related: a witness who is uncertain of his recollections before being hypnotized will become convinced by that process that the story he told under hypnosis is true and correct in every respect. This effect is enhanced by two techniques commonly used by lay hypnotists: before being hypnotized the subject is told (or believes) that hypnosis will help him to "remember very clearly everything that happened" in the prior event, and/or during the trance he is given the

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(Fn. 49 continued)

Hypnosis and Evidence: Help or Hindrance? (1980) 347 Annals N.Y. Acad. Sci. 73, 79; Kroger & Douce, Hypnosis in Criminal Investigation (1979) 27 Internat. J. Clinical & Experimental Hypnosis 358, 365-367.

suggestion that after he awakes he will "be able to remember" that event equally clearly and comprehensively.[50/] Further enhancement of this effect often occurs when, after he returns to the waking state, the subject remembers the content of his new "memory" but forgets its source, i.e., forgets that he acquired it during the hypnotic session ("post-hypnotic source amnesia"); this phenomenon can arise spontaneously from the subject's expectations as to the nature and effects of hypnosis, or can be unwittingly suggested by the

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50/ Such suggestions are recommended by police hypnosis manuals (e.g., Reiser, Handbook of Investigative Hypnois (1980) ch. 40), and were given in several of the cases discussed herein (e.g., Harding, Mack, and Mena).

hypnotist's instructions. Finally, the effect not only persists, but the witness' conviction of the absolute truth of his hypnotically induced recollection grows stronger each time he is asked to repeat the story; by the time of trial, the resulting "memory" may be so fixed in his mind that traditional legal techniques such as cross-examination may be largely ineffective to expose its unreliability. 51/

51/ Diamond, Inherent Problems, pages 339-340; Orne, Use and Misuse, pages 320, 327, 332; Cooper, Hypnotic Amnesia, in Hypnosis Research, pages 223-231; Cooper, Spontaneous and Suggested Post-Hypnotic Source Amnesia (1966) 14 Internat. J. Clinical & Experimental Hypnosis 180; Evans & Thorn, Two Types of Posthypnotic Amnesia: Recall Amnesia and Source Amnesia (1966) 14 Internat. J. Clinical & Experimental Hypnosis 162; Hilgard, Hypnotic Susceptibility (1965) pages 166, 182.

IV

The professional literature thus fully supports the testimony of Dr. Schafer and the similar findings of the courts in Mack, Mena, and Nazarovitch. It also demonstrates beyond any doubt that at the present time the use of hypnosis to restore the memory of a potential witness is not generally accepted as reliable by the relevant scientific community. Indeed, representative groups within that community are on record as expressly opposing this technique for many of the foregoing reasons, particularly when it is employed by law enforcement hypnotists.52/

52/ Thus in October 1978 the Society for Clinical and Experimental Hypnosis adopted a resolution reading in part:

"The Society for Clinical and Experimental Hypnosis views with alarm the tendency for police officers with minimal training in hypnosis and without a broad professional background in the healing arts employing hypnosis to presumably facilitate recall of witnesses or victims privy to the occurrence of some crime. Because we recognize that hypnotically

In these circumstances it is obvious that the Frye test of admissibility has not been satisfied. We therefore hold, in accord with the decisions discussed above

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(Fn. 52 continued)

aided recall may produce either accurate memories or at times may facilitate the creation of pseudo memories, or fantasies that are accepted as real by subject and hypnotist alike, we are deeply troubled by the utilization of this technique among the police. It must be emphasized that there is no known way of distinguishing with certainty between actual recall and pseudo memories except by independent verification.

"Police officers typically have had limited technical training and lack the broad understanding of psychology and psychopathology. Their orientation is to obtain the information needed to solve a crime rather than a concern focusing on protecting the health of the subject who was either witness to, or victim of, a crime. Finally, police officers understandably have strong views as to who is likely to be guilty of a crime and may easily inadvertently bias the hypnotized subject's memories even without themselves being aware of their actions." (27 Internat. J. Clinical & Experimental Hypnosis (1979) 452.)

In August 1979 an identical resolution was adopted by the International Society of Hypnosis. (Id. at p. 453.)

(Part II C, ante), that the testimony of a witness who has undergone hypnosis for the purpose of restoring his memory of the events in issue is inadmissible as to all matters relating to those events, from the time of the hypnotic session forward. It follows that the trial court erred in denying defendant's motion to exclude Catherine's testimony.53/

53/ We address the question of retroactivity for the guidance of bench and bar. In People v. Gainer (1977) 19 Cal.3d 835, we held it error to give the "Allen instruction" to potentially deadlocked juries; that instruction directed minority jurors to take into account the fact that a majority of their fellow-jurors disagreed with them, and implied that if the jury fails to agree the case will necessarily be retried. Prior to our ruling, a number of published opinions of the Courts of Appeal had expressly approved the giving of Allen-type instructions in California. Nevertheless, we concluded that our holding would apply to all cases not yet final as of the date of the Gainer decision, explaining that "our disapproval of Allen-type charges is not directed at the prophylactic prevention of police misconduct [citations]; rather it is aimed at judicial error which significantly infects the fact-finding process at trial. [Citation.] Given this critical purpose, neither judicial

We briefly discuss certain limitations on the rule. First, a previously hypnotized witness is not incompetent in the strict sense of being unable to express himself comprehensibly or understand his duty to tell the truth (Evid. Code, § 701), or of lacking the general capacity both to perceive and

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(Fn. 53 continued)

reliance on previous appellate endorsements of the charge in this state nor any effects on the administration of justice require us to deny the benefit of this rule to cases now pending on appeal. [Citations.] (Id. at p. 853.)

The Gainer rule applies a fortiori to the case at bar. No published appellate opinion of this state approved the admission of hypnotically induced evidence until Diggs did so on incorrect reasoning in 1980. (See fn. 32, ante.) In view of the conclusion of the scientific community that the hypnotic experience renders unreliable the testimony of the witness subjected to it, and the fact that such testimony is frequently a crucial part of the prosecution's case, the present error even more "significantly infects the fact-finding process at trial" than the instruction ruled impermissible in Gainer. For these reasons, our holding herein will apply to all cases not yet final as of the date of this decision.

remember (Jefferson, Cal. Evidence Benchbook (1972) § 26.2, p. 351.) Accordingly, if the prosecution should wish to question such a witness on a topic wholly unrelated to the events that were the subject of the hypnotic session, his testimony as to that topic would not be rendered inadmissible by the present rule.

Second, like the court in Mack (fn. 28, ante) we do not undertake to foreclose the continued use of hypnosis by the police for purely investigative purposes. We recognize that on occasions in the past a subject has apparently been helped by hypnosis to remember a verifiable fact -- such as a license plate number -- that the police previously did not know and were then able to use as a "lead" for further investigation of the crime. It is neither appropriate nor necessary for us to enter the debate as to the need for this

investigative technique,[54] or its reliability.[55] We reiterate, however,

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54/ Dr. Diamond, for example, believes that "the value of hypnosis for investigative purposes has been greatly overstated by exaggerated claims in irresponsible books and articles. As Freud discovered long ago, whatever can be done by hypnosis can also be done without hypnosis; it merely takes longer and requires greater skill and patience. My own experience convinces me that safe and effective enhancement of recall, with less hazard of suggestion and contamination of future testimony, can be accomplished without gimmicks such as hypnosis and 'truth serum.'" (Diamond, Inherent Problems, p. 332, fn. 93.)

55/ Experience has shown that even such an apparently objective fact as a license plate number can as easily be confabulated as accurately remembered. (Orne, Use and Misuse, p. 318; Putnam, op. cit. supra fn. 48, at pp. 444-445.) For this reason, even proponents of the practice warn against relying without verification on any "fact" recalled by the subject as a result of hypnosis: "The most one can legitimately expect from hypnotic interrogation is further data, which may serve as leads for more conventional evidence gathering. Data elicited through hypnosis by itself deserve low or no priority until they are supported by other data." (Spiegel, op. cit. supra fn. 49, at p. 79.) And Kroger and Douce likewise conclude that "hypnotically related evidence must be validated through careful independent investigation

that for the reasons stated above any person who has been hypnotized for investigative purposes will not be allowed to testify as a witness to the events of the crime. Like the court in Mena (624 P.2d at p. 1280, fn. 1), we do not decide at this time whether procedural devices may be available to alleviate any resulting difficulty of proof.

Third, error in admitting the testimony of a previously hypnotized witness is not reversible per se; its effect must still be judged under the prejudicial error test adopted in People v. Watson (1956) 46 Cal.2d 818, 836.

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(Fn. 55 continued)

or it is useless! In short, hypnosis is not a modality designed to determine truth from deception." (Kroger & Douce, op. cit. supra fn. 49, at p. 371; accord, Schafer & Rubio, Hypnosis to Aid the Recall of Witnesses (1978) 26 Internat. J. Clincial & Experimental Hypnosis 81, 83.)

(See People v. Kelly, supra, at p. 40 of 17 Cal.3d.) The test is to be applied, however, in light of the reasons for our holding herein.

Arguing that the error was harmless, the Attorney General assumes that the inadmissible evidence in this record is limited to those few portions of Catherine's testimony that she asserted were directly affected by her hypnotic experience. (See Part I B, ante.) Yet as we have seen, it is the consensus of informed scientific opinion today that in no case can a person previously hypnotized to improve his recollection reliably determine whether any unverified item of his testimony originates in his own memory or is instead a confusion or confabulation induced by the hypnotic experience. It would fly in the face of that consensus to allow a witness to be

the judge of which portions of his testimony were actually produced by hypnosis.

The Attorney General suggests that we can at least determine which of Catherine's recollections were potentially the product of hypnosis, by the device of comparing her testimony at trial with the prehypnotic versions of her story given in her interview at the police station and her testimony at the preliminary hearing. But Dr. Schafer's testimony and the professional literature agree that the effects of pretrial hypnosis to restore a witness' recollection go beyond the bare production of pseudomemories during the trance: the experience will tend to clothe the witness' entire testimony in an artificial but impenetrable aura of certainty,[56/]

56/ There is evidence that some law enforcement agencies hypnotize appropriate prospective witnesses not to fill gaps in their memory but merely to bolster their

and may distort the witness' recall of related events occurring both before and after the hypnotic session.[57] Moreover,

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(Fn. 56 continued)

credibility and make them "unshakeable" on the stand. (See, e.g., Orne, Use and Misuse, p. 332; State v. Mack (Minn. 1980) supra, 292 N.W.2d 764, 769 & fn. 10 [reporting testimony by Dr. Orne to the same effect].)

57/ For example, Dr. Diamond reports that "the police may tell a witness something just before hypnosis and then hypnotize him. When he awakes, his 'source amnesia' may lead him to believe that the police statement was a product of his own memory. Sometimes communications made to the patient after hypnosis may be retroactively integrated into the hypnotic recall. The subject may recall a fact with with no awareness that it was not the product of his own mind. Or he may recall being told the fact but insist that he had prior knowledge of it. This often happens when subjects are shown photographs or line-ups for identification just before or just after hypnotic sessions." (Diamond, Inherent Problems, at p. 336.) The author observes that these distortions of memory tend to be strengthened by the passage of time, and concludes that pretrial hypnosis of a witness "appreciably influences all of his subsequent testimony in ways that are outside the consciousness of the witness and difficult, if not impossible to detect." (Italics added; ibid.)

it would be impossible in most cases for an appellate court to undertake the kind of comparative analysis proposed by the Attorney General, because such materials as station-house interviews by the police or preliminary hearing testimony are not ordinarily part of the record.[58/]

We conclude that proper application of the Watson prejudicial error test in the present context requires the appellate court to determine whether it is reasonably probable that a result more favorable to the defendant would have occurred if the testimony of the previously hypnotized witness as to all matters relating to the events of the

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58/ Indeed, in the case at bar the Attorney General successfully opposed a motion by defendant to augment the record in the Court of Appeal to include the preliminary hearing transcript. Although we ultimately lodged that transcript in the court over the Attorney General's opposition, he successfully objected to our lodging in addition a transcript of Catherine's interview at the police station.

crime had not been admitted. This was the analysis we followed in Kelly. Applying the same analysis to the record before us, we find the error in admitting Catherine's testimony at trial to be prejudicial as it constituted virtually the sole incriminating evidence against defendant. To prevent a miscarriage of justice, a conviction predicated on such tainted evidence cannot be allowed to stand. (Cal. Const., art. I, § 13.)

V

Of defendant's remaining contentions, we need address only one that bears on the question of retrial. At the close of the prosecution's case-in-chief, defendant unsuccessfully moved for a judgment of acquittal on the ground of insufficiency of the evidence. (Pen. Code, § 1118.1.) He now contends the trial court erred in denying that motion, arguing that Catherine was

incompetent as a witness because her intoxication had impaired her ability to perceive and remember the events of the evening, and that her testimony was so inconsistent as to be unbelievable. The effect of her intoxication, however, was for the jury to determine; on this record it falls far short of incompetence as a matter of law. And although her testimony was vague and self-contradictory on a number of points, when taken as a whole it was not inherently incredible and would have constituted at least "substantial evidence" to support a verdict of guilt. (See People v. Blair (1979) supra, 25 Cal.3d 640, 666; People v. Pierce (1979) 24 Cal.3d 199, 210.)

It is true that we now hold Catherine's testimony legally inadmissible because of her pretrial hypnotic experience. But in the circumstances of this case the holding does not justify a

judgment of acquittal. The purpose of a motion under section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case. (People v. Belton (1979) 23 Cal.3d 516, 520-521.) It therefore speaks to "the evidence then before the court" (§ 1118.1), i.e., to the evidence that the trial court has properly admitted as of the time the motion is determined. As noted above (fn. 33, ante), none of the hypnosis cases we now follow had been decided as of the time of the motion herein, and hence the trial court applied the then-prevailing general rule that the fact of Catherine's pretrial hypnotic experience went to "the weight, not the admissibility" of her testimony.

For the same reason, retrial is not prohibited by the federal double jeopardy clause under the rule of Burks v. United States (1978) 437 U.S. 1, and

Greene v. Massey (1978) 437 U.S. 19, followed in this state (People v. Pierce, supra, 24 Cal.3d at pp. 209-210.) That rule forbids retrial after a reversal ordered because the evidence introduced at trial was insufficient to support the verdict. (See, e.g., In re Johnny G. (1979) 25 Cal.3d 543, 548-549.) It is inapplicable, however, to the situation here presented. The rule achieves its aim -- i.e., of protecting the defendant against the harassment and risks of unnecessary repeated trials on the same charge -- by the device of giving the prosecution a powerful incentive to make the best case it can at its first opportunity. (Burks, at p. 11.) But the incentive serves no purpose when, as here, the prosecution did make such a case under the law as it then stood; having done so, the prosecution had little or no reason to produce other evidence of

guilt. To be sure, we now hold it error to admit Catherine's testimony against defendant; but "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." (Id. at p. 15.) Rather, the matter is governed by the settled rule that the double jeopardy clause does not prohibit retrial after a reversal premised on error of law. (Ibid.; accord, United States v. Tateo (1964) 337 U.S. 463, 465, and cases cited.)59/

It follows that there is no legal bar to retrying defendant on these charges. Of course, for the reasons stated above Catherine cannot be allowed testify in such a trial on any of the events

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59/ We do not decide whether the same result would follow in a case in which the evidence held inadmissible on appeal had also been inadmissible at the time of trial. The United States Supreme Court expressly left this question open in Greene. (437 U.S. at p. 26, fn. 9.)

that were the subject of her hypnotic experience; her prehypnotic testimony at the preliminary hearing, however, may be admissible in lieu thereof.[60] Whether a

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60/ Because Catherine is now "Disqualified from testifying to the matter" (Evid. Code, § 240, subd. (a)(2)) she is "unavailable as a witness" within the meaning of the former-testimony exception to the hearsay rule (id., § 1291, subd. (a)), and her preliminary hearing testimony was given in a proceeding in which defendant had the "right and

retrial is justified in the circumstances of this case is for the prosecutor to determine.

The judgment is reversed.

MOSK, J.

WE CONCUR:
BIRD, C.J.
NEWMAN, J.
BROUSSARD, J.
*TOBRINER, J.

(Fn. 60 continued)

opportunity" to cross-examine her with the same "interest and motive" that he now has (id., subd. (a)(2)). Unless defendant can show that Catherine's disqualification as a witness "was brought about by the procurement or wrongdoing of the proponent of [her] statement for the purpose of preventing [her] from attending or testifying" (id., subd. (b)), her preliminary hearing testimony is therefore admissible under the Evidence Code.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

PEOPLE v. SHIRLEY

Crim. 21775

CONCURRING OPINION BY
RICHARDSON, J.

I concur in the judgment. Under the circumstances in this case, the prosecutrix' testimony was subject to objection because it was the product of a hypnotic session conducted by a deputy district attorney rather than by a trained professional who was wholly unaffiliated with law enforcement.

I am unable, however, to support an absolute rule rendering inadmissible all hypnotically induced testimony without regard to the safeguards under which the hypnosis occurred. Consistent with recent authority and critical commentary, such testimony should be admissible if elicited under adequate safeguards including requiring that, (i) the hypnosis is conducted by a

trained, independent psychiatrist or psychologist who in writing is supplied with only sufficient factual background necessary to conduct the session; (2) the hypnosis is videotaped or otherwise recorded for purposes of subsequent review; (3) no persons other than the hypnotist and his subject are present; and (4) the hypnotist obtains a written description of the subject's prior description of the event for comparison purposes. (See State v. Hurd (N.J. 1981) 432 A.2d 86, 96-97; Note, The Admissibility of Testimony Influenced by Hypnosis (1981) 67 Va. L.Rev. 1203, 1230-1232.) If the procedures used are free of suggestion and, in the discretion of the trial court, the probative value of the testimony is not outweighed by its potential for prejudice, I would admit it.

As stated by the New Jersey Supreme Court in Hurd, "we believe that a rule of per se inadmissibility is unnecessarily broad and will result in the exclusion of evidence that is as trustworthy as other eyewitness testimony." (P. 94; accord, Note, supra, at p. 1233.) I share that belief.

RICHARDSON, J.

PEOPLE v. SHIRLEY

Crim. 21775

CONCURRING AND DISSENTING OPINION BY KAUS, J.

I concur in the reversal of the judgment, but feel compelled to dissent from several conclusions of the majority unnecessary to decide this appeal.

On the record before us, this is a relatively simple case. At the outset of the trial, defense counsel objected that a portion of the testimony Catherine was about to give--concerning a period of time during which she had previously testified that she had been asleep--was the result of the improper use of hypnosis, that "it is not in fact refreshing a witness' recollection . . . but that it is . . . manufactured evidence." (My emphasis.) The trial court overruled the objection

on the basis that the hypnosis only went to the weight of Catherine's testimony.

That ruling was patently wrong, even if there may have been some out-of-state case law to support it. Section 702 of the Evidence Code demands that the testimony of any witness, except an expert, be based on personal knowledge and provides that "[a]gainst the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter." Defendant clearly objected that the witness was about to testify from other than personal knowledge--that she was about to give "manufactured evidence." This placed the burden of showing that the witness would testify from personal knowledge on the prosecutor, who did nothing except argue that People v. Colligan (1979) 91 Cal. App.3d 846 "indicated that hypnosis

did not as a matter of law render inadmissible the subsequent identification of a defendant by the witness." Obviously the citation of a case is not a showing that a particular witness is about to testify from personal knowledge, and, in fact, the Colligan decision does not purport to relieve a prosecutor of the burden of demonstrating the personal knowledge of a previously hypnotized witness in response to a proper objection.[1/]

1/ In Colligan, a witness to a robbery was hypnotized shortly after the crime to help her recall the license plate of a car used in the robbery, and during the hypnosis the witness also gave a description of the robber. At trial, the witness identified the defendant as the robber, apparently without objection, but on appeal the defendant contended that the possibility of suggestion by the hypnotist was necessarily tainted, warranting a reversal of the conviction.

Thus, on this state of the record, the trial court should not have admitted Catherine's challenged testimony. Given the ambiguities and

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(Fn. 1 continued)

The Colligan court rejected the contention, explaining: "In People v. Johnson (1974) 38 Cal.App.3d 1 . . . we held that a claim of improper pretrial identification will not be considered on appeal absent an objection in the trial court, because the trial court has no reason to inquire into the independent recollection of the witness if the issue is not before it. (38 Cal.App.3d at p. 6.) In that case, as here, faulty identification was at the heart of the defense and the witness was subjected to vigorous, detailed cross-examination on that issue. Furthermore, defendant does not contend that hypnotic suggestions were actually made to [the witness] which affected her identification; thus no reason to depart from the view expressed in Johnson exists. We decline to hold that the use of hypnosis to help a witness remember a license number per se invalidates the identification of a person seen and heard by that witness . . . ." (91 Cal.App.3d at p. 850.)

inconsistencies of Catherine's additional testimony, and the substantial evidence presented by the defense, the error was clearly prejudicial and requires reversal of the judgment. This is all we need to decide in this case.

I recognize, of course, that we have about a dozen additional hypnosis cases pending before us, and that the majority has chosen to use this appeal as a vehicle for deciding the broader issues presented by some of the others. In my view, however, it is a mistake to adopt at this point the sweeping, "per se" rule that the majority proposes--excluding virtually all testimony of a witness who has undergone pretrial hypnosis--without more carefully considering the varied contexts in which hypnosis may take place and the many factors which may affect both the

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potential danger and the potential utility of hypnosis in a particular instance.

This is the first time we have been called upon to consider the admissibility of a witness' post-hypnosis testimony, and it is by no means clear to me that the facts of this case are typical of hypnosis cases in general. There are obviously a number of factors that render Catherine's post-hypnosis testimony particularly suspect. Because she was at least somewhat intoxicated at the time of the alleged offense, there is a good possibility that she has no clear memory to be refreshed by hypnosis, and instead that she has simply constructed or "confabulated" a "memory" while under hypnosis. (Cf., e.g., Commonwealth v. Nazarovitch (Pa. 1981) 436 A.2d 170, 177-178.) In addition, at the time she was

hypnotized she had already been given a number of somewhat different accounts of the evening in question, and the academic literature suggests that under such circumstances there is a particularly strong danger that hypnosis will simply serve to fix one particular version--not necessarily the historically accurate one--in the subject's mind and render the witness impervious to cross-examination. (See Orne, The Use and Misuse of Hypnosis in Court (1972) 27 Internat. J. Clinical & Experimental Hypnosis 311, 332-334.) Finally, of course, the hypnosis in this case was not performed by an impartial hypnotist in a setting calculated to minimize potential suggestiveness, but by a deputy district attorney in the presence of the investigating police officers. Given all these facts, I can agree with the majority that, if this

case is retried, Catherine should not be permitted to testify.

I think, however, that we should be very wary about establishing a broad, generally applicable exclusionary rule for all post-hypnosis testimony on the basis of the rather egregious facts of this case alone. In other instances, hypnosis may arise in a completely different setting, as, for example, when a victim or a witness to a crime is hypnotized shortly after the offense to aid a police artist compose a sketch of the suspect. In such a case, none of the participants to the hypnosis may have any preconceived bias which would pose a special danger of suggestiveness, and in some cases the witness' post-hypnosis testimony statements may not differ at all from his or her pre-hypnosis statements, or the suspect may be later caught with incrimi-

nating evidence corroborating the reliability of at least some of the witness' post-hypnosis memory. If, in such a case, an adequate record of the hypnosis session exists and demonstrates the session's basic fairness, it is not clear to me that the mere fact that the victim or witness has at one time been hypnotized necessarily mandates the total exclusion of the potentially crucial testimony at a later trial.

Contrary to the majority's conclusion, I do not believe that faithful adherence to the Frye standard compels the all-encompassing per se exclusionary rule adopted in its opinion. Just last year, in State v. Hurd (1981) 86 N.J. 525 (432 A.2d 86), the New Jersey Supreme Court, in a thoughtful and scholarly opinion by Justice Pashman, applied the Frye standard to post-hypnosis testimony and

concluded that "a rule of per se inadmissibility is unnecessarily broad and will result in the exclusion of evidence that is as trustworthy as other eyewitness testimony." (432 A.2d at p. 94.) In Hurd, a number of preeminent authorities in the field of hypnosis--including Dr. Orne--testified in person at a pretrial evidentiary hearing. On appeal, the New Jersey court, after reviewing both this testimony and much of the same academic literature discussed by the majority in this case, pointed out that while the experts had made it clear that hypnosis is not a tool which can in any way guarantee the accuracy or historical "truth" of a subject's recall, they had at the same time indicated "that in appropriate cases and where properly conducted the use of hypnosis to refresh memory is comparable in reliability to

ordinary recall." (432 A.2d at p. 95; emphasis added.)

Although keenly aware of the potential problems of "confabulation" and possible interference with cross-examination posed by hypnosis, the Hurd court recognized that recent psychological research has demonstrated that similar problems inhere in eyewitness testimony in general, particularly when--as is very often the case--a witness has been repeatedly interrogated and has recounted his proposed testimony several times before trial. (Id., at p. 94.)[2/]

2/ In this regard, the court cited Marshall et al., Effects of Kind of Question and Atmosphere of Interrogation on Accuracy and Completeness of Testimony (1971) 84 Harv.L.Rev. 1620; Levine & Tapp, The Psychology of Criminal Identification (1973) 121 U.Pa.L.Rev. 1079; Note, Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification (1977) 29 Stan.L.Rev. 969.

Indeed, given the majority's own rendering of modern views concerning the nature and fallibility of unhypnotized human memory (see, pp. ___, ante*), it may not be entirely facetious to suggest that if we are to exclude eyewitness testimony unless shown to be scientifically reliable, we may have little choice but to return to trial by combat or ordeal.

Observing that courts have never required "historical accuracy as a condition for admitting eyewitness testimony," the Hurd court concluded that, under Frye, hypnotically aided testimony should properly be admitted in a criminal trial if the party proffering the evidence demonstrates "by clear and convincing evidence" (id., at p. 97)

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*Majority opinion, pages 59-69.

"that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory." (Id., at p. 95.) The court then went on to discuss in some detail various factors--e.g., the kind of memory loss encountered, the apparent motivations of the hypnotized witness, and the procedural safeguards under which the hypnosis session was conducted--that are likely to affect the reliability of post-hypnosis testimony in a given case. (Id., at pp. 95-97.)

In my view, if we are to reach the broad question of the general admissibility of post-hypnosis testimony at this time, we should adopt the more cautious approach of the Hurd decision, rather than pronounce a general rule excluding virtually all post-hypnosis testimony regardless of the facts of a

particular case. Perhaps in the future, as we gain more experience in this area, we will find that post-hypnosis testimony is so often unreliable that "the game is not worth the candle" (see p. ___, ante*) and that a broad, prophylactic exclusionary rule is warranted. At this point, however, I think such a judgment is premature.

Moreover, even if a majority of the court believes that the dangers of hypnosis are so great as to warrant a broad per se exclusionary rule for the future, I think the majority opinion errs in applying its sweeping holding retroactively, rendering incompetent virtually all witnesses who have been hypnotized at any time in the past without regard to the circumstances of the hypnosis.

*Majority opinion, page 31.

From all accounts, there has in the last few years been a great increase in the use of hypnosis at the investigative stage of the criminal process. The news media frequently report instances in which eyewitnesses to kidnapings or other crimes are hypnotized to help police artists prepare sketches of potential suspects. Until today, we had never indicated that by utilizing this investigative technique, the police would automatically and irrevocably taint a witness and make him or her ineligible to testify about anything related to the hypnosis.

While on a number of occasions we have ruled that extrajudicial statements made under hypnosis may not be introduced as evidence of the truth of the statements made, to my knowledge we have never before even hinted that once

a potential witness is hypnotized he or she thereafter becomes ineligible or incompetent to testify about any matter touched upon during hypnosis. For example, in the several cases in which a defendant has been hypnotized by a defense psychiatrist before trial to aid in ascertaining the defendant's mental state at the time of the offense (see, e.g., People v. Modesto (1963) 59 Cal. 2d 722, 732-733), we have never suggested that the defendant could not thereafter testify at trial. Similarly, in People v. Blair (1979) 25 Cal.3d 640, 664-666, although we held that the trial court properly excluded a statement made by a prosecution witness while under hypnosis, we did not question the propriety of the witness' post-hypnosis in-court testimony.

The majority relies on People v. Gainer (1977) 19 Cal.3d 835, 853, in

concluding that its per se exclusionary rule should be applied retroactively. Unlike Gainer, however, retroactive application here will not simply result in the retrial of a number of cases under proper jury instructions, but instead will necessarily demand that a witness who has undergone hypnosis be automatically barred from testifying at any retrial. In many cases, this will mean that the prosecution--or the defense--will, after-the-fact, be unexpectedly deprived of its main, and perhaps critical, witness.

In view of these potential consequences, we need to be particularly careful in determining how to handle cases in which a hypnosis session was held before our decision in this case was filed. At least with respect to this class of cases, we should refrain from imposing a broad, per se

exclusionary rule, and should leave open the possibility that, in light of all the facts of a particular case, it may be found that a previously hypnotized witness' testimony is not irretrievably tainted.

KAUS, J.

APPENDIX B

APPENDIX B

ORDER DENYING REHEARING

Crim. 21775

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

[Filed June 4, 1982]

PEOPLE,)
)
v.)
)
DONALD LEE SHIRLEY,)
)

Reynoso, J., did not participate.

Opinions modified. Respondent's petition for rehearing DENIED.

Richardson, J., and Kaus, J., are of the opinion that the petition should be granted.

The application for stay of the issuance of the remittitur is DENIED.

BIRD
Chief Justice

APPENDIX C

APPENDIX C

[Filed June 4, 1982]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Crim. 21775

THE PEOPLE,
Plaintiff and Respondent,
v.
DONALD LEE SHIRLEY,
Defendant and Appellant.

MODIFICATION OF OPINION

BY THE COURT:

The opinion in the above-entitled case, appearing at 13 Cal.3d 18, is modified as follows:

1. On page 46, in the second line of the second full paragraph, the word "entire" is deleted.

2. On page 48, line 22, the footnote indicator number for footnote 29 is relocated to the end of line 10 following the word "deposition."

3. On page 48, footnote 29 is deleted and the following new footnote is substituted therefor:

29/ The Arizona Supreme Court returned to the subject in a pair of later opinions. In State of Arizona ex rel. Collins v. Superior Court (Jan. 7, 1982) ___ P.2d ___ (Collins I) the court reiterated in detail the Mena holdings that hypnotically induced testimony is inadmissible under the Kelly-Frye rule and impairs the constitutional right of confrontation. The court also held that no amount of procedural "safeguards" could make such testimony sufficiently reliable to be admitted, but allowed the limitied use of hypnosis for investigative purposes. Following a change of personnel, the court granted a rehearing and filed a "supplemental opinion" by a different author. (State of Arizona ex rel. Collins v. Superior Court (May 4,

1982) ___ P.2d ___ (Collins II).) In the supplemental opinion the court reaffirmed at length the foregoing principal holdings of Mena and Collins I, but by a bare majority allowed a witness who has undergone pretrial investigative hypnosis to testify to facts he remembered before being hypnotized, provided there is compliance with certain "safeguards." (Id. at pp. ___-___.) The author of Collins I dissented on the latter point for a number of scientific and practical reasons that we find persuasive. (Id. at pp. ___-___.)

4. On page 51, the citations in parenthesis at the end of the first full paragraph are deleted and the following new citations are substituted therefor: (Id. at pp. 176-177; accord, State v. Palmer (Neb. 1981) 313 N.W.2d 648, 653-655 [rejecting Hurd and holding hypnotically induced testimony inadmissible for lack of general scientific acceptance]; People v.

Gonzales (Mich. App. 1981) 310 N.W.2d 306, 308-314 [same].)

5. On page 67, after the first full paragraph, the following new paragraph is inserted:

Second, when it is the defendant himself -- not merely a defense witness -- who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused to testify in his own behalf. (People v. Robles (1970) 2 Cal.3d 205, 214-215.)

6. On page 67, the first word of the second full paragraph of the advance sheet is changed from "Second" to "Third."

7. On page 67, footnote 53 is deleted and the following new footnote is substituted therefor:

53/ The principles stated in this opinion will govern the admissibility of the testimony of any witness who submits to pretrial hypnosis after the date of this decision. We take no position at this time as to the application of those principles to witnesses hypnotized before the date of this decision.

8. On page 68, lines 4 through 8 are deleted and the following text is substituted therefor:

testify as a witness to the events that were the subject of the hypnotic session. Evidence discovered by such an investigation, of course, is not ipso facto rendered inadmissible by the prior hypnosis.

9. On page 68, the first word of the first full paragraph is changed from "Third" to "Fourth."

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[Filed June 4, 1982]

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Crim. 21775

THE PEOPLE,
Plaintiff and Respondent,
v.
DONALD LEE SHIRLEY,
Defendant and Appellant.

MODIFICATION OF CONCURRING AND DISSENTING OPINION

BY

KAUS, J.

The concurring and dissenting opinion, appearing at 31 Cal.3d at page 73, is modified as follows:

1. On page 76, the following footnote 3 is added at the end of the last paragraph:

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3/ I noted that the expansive exclusionary rule fashioned by the majority in this case is considerably broader than the rule adopted by the out-of-state decisions on which the majority purports to rely. As the Supreme Court of Arizona explained in its very recent decision in State v. Collins (Collins II) (May 4, 1982) ___ P.2d ___, ___, virtually all of the jurisdictions which have announced a general rule excluding testimony of memory "refreshed" or "created" by hypnosis, have nonetheless held that under appropriate circumstances a previously-hypnotized witness is not precluded from testifying about events which the witness remembered and reported before undergoing hypnosis. (See, e.g., Collins II, supra; State v. Koehler (Minn. 1981) 312 N.W.2d 108, 110; State v. Wallach (Mich.App. 1981) 312 N.W.2d 387, 404-405; Com. v. Taylor (Pa.Super.Ct. 1982) 439 A.2d 805, 806-808; cf. Polk v. State (1981) 48 Md.App. 382 [427 A.2d 1041, 1048-1049]; State v. Palmer (1981) 210 Neb. 206 [313 N.W.2d 648, 655] (conc. opn. signed by equal number of justices as lead opn.).) Although it is unnecessary to reach the issue in this case, the majority--in dictum--apparently rejects even this moderate limitation on its sweeping "incomptency" rule. (See ante, p. 48, fn. 29, pp. 67-68.)

2. On pages 77 and 78, delete the material appearing therein and replace with the following paragraph:

Finally, it seems to me that if the majority opinion is correct, then the exception which the opinion establishes for previously hypnotized defendants who wish to testify is unsupportable. Whether the right to testify in one's defense is "fundamental" (People v. Robles (1970) 2 Cal.3d 205, 215) or constitutional (cf. Washington v. Texas (1967) 388 U.S. 14, 20-22), there can be no right to offer testimony which suffers from all of the potential vices which have triggered the majority's total ban on the testimony of hypnotized witnesses. While I have tried to explain why, in my opinion, the majority goes much too far, if the majority's reasoning is correct, I can see no basis for excepting the defendant on trial.

KAUS, J.

APPENDIX D

APPENDIX D

UNITED STATES CONSTITUTION

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

. . . . . .

82-78

No.

Office - Supreme Court, U.S.
FILED
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

DONALD LEE SHIRLEY,
Respondent.

On Appeal from the Supreme Court of California

OPPOSITION TO PETITION FOR CERTIORARI CRIMINAL CASE

EPHRAIM MARGOLIN
Counsel of Record

NICHOLAS C. ARGUIMBAU
240 Stockton Street, 3rd floor
San Francisco, CA 94108
Telephone: (415) 421-4347

STEPHEN C. HOSFORD
12882 Main Street
Garden Grove, CA 92640
Telephone: (714) 537-7750
Attorneys for Respondent

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SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

OPPOSITION TO PETITION FOR CERTIORARI - Criminal Case

ARGUMENT

INTRODUCTION

The petition before this Court represents the denouement of an extensive debate in the California courts over the admissibility in criminal trials of testimony induced with the aid of hypnosis. The debate has been waged, in large part, over witnesses hypnotized by police hypnotists under the tutelage of Martin Reiser, of the Los Angeles Police Department. See note 35, opinion below. The scientific and legal issues have

been widely discussed and have once before been brought before this Court from California. Quaglino v. People of the State of California, No. 77-1288, cert. denied, 99 S.Ct. 599 (1978).

A careful reading of the petition for certiorari in this case reveals that the California Attorney General seeks review in this Court, not of the decision of the California Supreme Court with respect to respondent, SHIRLEY, whose retrial is now commencing in the Superior Court, but only of a prospective ruling of that Court given to "provide the bench and bar with . . . guidance in other litigation . . . ." 31 Cal.3d at 54. That "guidance" may in fact be moot, for reasons set forth below, and the Attorney General does not argue that the decision with respect to respondent, SHIRLEY, is in any way incorrect. For these reasons, there is no "case" or "controversy" presented by the within petition, in violation of Article III, Section 2 of the United States Constitution.

Be that as it may, for reasons which follow, the due process assertions of the California Attorney General are without merit.

I. THE PROSPECTIVE RULING OF THE CALIFORNIA SUPREME COURT MAY PROVE TO BE MOOT.

In June, 1982, the voters of California adopted an initiative measure (Proposition 8) known as the "Victims' Bill of Rights." That initiative measure included addition of Article 1, Section 28(d) to the California Constitution:

> "Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, §§ 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

Since this provision explicitly limits judicially-created rules of evidence in California, it may be found to limit the

prospective effect of Shirley. This Court may take judicial notice of the fact that the constitutionality of the Victims' Bill of Rights is currently being considered in Brosnahan, et al. v. Brown, et al., S.F. 24441 (California Supreme Court), and that on July 2, 1982, the California Supreme Court sent to the parties a letter requesting responses to various questions, including whether decisional law on the admissibility of hypnosis evidence has survived the adoption of this provision.[1/]

Because of the above, it is possible that the California Supreme Court will shortly limit the prospective effect of Shirley in similar cases.

1/ Counsel on both sides in this case are also counsel of record in Brosnahan. It might be noted that during a program for the California Continuing Education of the Bar entitled "Practice After Proposition 8," the representative of the California Attorney General's office articulated the position that Shirley is no longer the law. The letter is attached as Exhibit A hereto.

II. THIS COURT LACKS JURISDICTION TO RESOLVE PETITIONER'S CLAIMS.

Petitioner's only serious argument is that it was in some fashion denied due process as a result of the decision of the California Supreme Court to judicially notice scientific literature on hypnosis. Assuming, arguendo, that petitioner's claim is meritorious, it does not follow that this Court can take jurisdiction, because, as the Supreme Court of California made eminently clear, the outcome of this case in no way depended upon the cited scientific literature. The steps in the California Supreme Court's analysis were as follows:

1. The Court determined that hypnosis as a device for enhancing memory of witnesses must first meet the requirements of People v. Kelly, 17 Cal.3d 24, 30 of "general acceptance of the . . . technique in the relevant scientific community."

2. The Court reiterated the holding of Kelly that "it is the proponent of

such testimony . . . who has the burden of . . . demonstrating by means of qualified and disinterested experts that the new technique is generally accepted as reliable in the relevant scientific community." 31 Cal.3d at 54.

3. The Court held that "in the case at bar the prosecutor did not take up that burden and made no such showing. On this ground alone, we would ordinarily be justified in holding the challenge to testimony inadmissible." Id.

4. Solely for the purpose of providing "the bench and bar with . . . guidance in other litigation presenting the same question," the Court took up an examination of the literature, reiterating that it would be guided by the principle that "the burden is on the proponent of the . . . technique to show a scientific consensus supporting its use." 31 Cal.3d at 56.

5. The petitioner totally failed to meet that burden. The Supreme Court held that its review of the literature "demonstrates beyond any doubt that at the present time the use of hypnosis to restore the memory of a potential witness is not generally accepted as reliable by the relevant scientific community." 31 Cal.3d at 66 (emphasis added.) Thus, the California Supreme Court did not rely upon the scientific literature at all for reversing the judgment against respondent, nor did it foreclose the opportunity for petitioner to prove in some future case that a consensus has been reached in the relevant scientific community that hypnosis has become reliable under appropriate safeguards. In short, the "due process" claims in this case cannot affect the outcome of this case but, at most, some unspecified case which may or may not arise in the future.

When the portion of a lower court's

opinion objected to its clearly advisory, this Court has no jurisdiction to review that portion on certiorari. This Court "is without power to give advisory opinions. It has long been its considered practice not to decide abstract, hypothetical, or contingent questions, or to decide any constitutional question in advance of the necessity for its decision . . . ." Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945). Since a decision in petitioner's favor by this Court would have no effect on the outcome of the case or on the rights of respondent, to grant a writ of certiorari in the present case to decide the constitutionality of the California Supreme Court's exercise of judicial notice, would exceed this Court's authority to review "cases" and "controversies." Article III, Section 2, United States Constitution.

Similar problems exist with a grant of certiorari in this case based upon

the California Attorney General's objection to the dictum in the Shirley opinion excepting testimony of hypnotized defendants; see discussion, infra, Part IV of this brief.

Additionally, a grant of certiorari to decide the issues raised by the Attorney General would violate the long-standing principle that this Court will not review cases where there is an independent and adequate state ground for decision. See, e.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566, 53 L.Ed.2d 965 (1977). The California Supreme Court was explicit in this case that the result would be the same regardless of its specific conclusions about admissibility of hypnosis evidence generally, since the People failed to meet their burden of showing hypnosis to be reliable under People v. Kelly, supra. Kelly defines a state-law procedure for allowing "scientific" evidence, and the California Attorney General does not

challenge Kelly before this Court. Therefore, there was an independent and adequate state ground for the decision below.

III. THE CALIFORNIA SUPREME COURT'S EXERCISE OF JUDICIAL NOTICE RAISES NO DUE PROCESS ISSUE.

The California Attorney General argues without citation of any authority that he was denied due process as a result of the California Supreme Court's reliance on technical literature for the purpose of providing "the bench and bar with . . . guidance in other litigation." 31 Cal.3d at 54.

However, the furthest this Court has ever gone in limiting judicial notice on due process grounds is to hold that in a trial court, an accused must be "informed at the trial of the facts of which the court is taking judicial notice." Garner v. Louisiana, 368 U.S. 157, 173, 7 L.Ed.2d 207 (1961). Even that principle was questioned by Justice Harlan, who pointed out that "without any such notification this Court has many times taken judicial notice of well-known economic and social facts," 368 U.S. at 195.

In the context of quasi-judicial

administrative proceedings, this Court has long recognized that official notice of technical documents complies with due process as long as adequate notice is given that the documents will or may be considered. See Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 81 L.Ed.2d 1093 (1937); Brown Transportation Co. v. Arkansas-Best Freight, 417 U.S. 281, 42 L.Ed.2d 447 (1974); and Market Street Railway Co. v. Railroad Commission of California, 324 U.S. 548, 89 L.Ed. 1171 (1945). No authority known to counsel exists which limits the constitutional authority of appellate courts to exercise judicial notice in providing "guidance" to "the bench and bar."

Significantly, the California Attorney General had years' notice that the defendants in the cases consolidated for hearing with Shirley before the California Supreme Court were relying in part on the extensive body of technical literature

supporting their position. Most, if not all, of the scientific authorities discussed in the California Supreme Court's opinion were also discussed in briefs and oral argument submitted long before the decision.

The Shirley record is an incomplete record of those matters which were properly before the Supreme Court of California in making its decision. This Court's attention is particularly drawn to a letter dated April 10, 1981, in which the California Supreme Court notified all parties that it would consider the briefs in People v. Johnson, Crim. No. 21624, and People v. Titman, Crim. No. 21625, in reaching a decision in People v. Shirley. See Exhibit B hereto. If this Court is of the opinion that any due process issue could exist, it should have a complete record before it, including the records of all the cases consolidated for hearing in Shirley, and respondent submits that it is the responsibility

of the petitioner to assure that such a record is before this Court.

It should be noted that the brief of amicus curiae, California Attorneys for Criminal Justice, in Johnson and Titman (submitted by counsel for SHIRLEY here) cited 26 separate publications in the technical literature, including all authorities in note 46, 31 Cal.3d at 64; the last three authorities in note 48, 31 Cal.3d at 64; and the authorities in note 52, 31 Cal.3d at 66. Additionally, the appellate committee of the California District Attorneys Association submitted an amicus brief in Johnson and Titman citing eight scientific papers on hypnosis, including Spiegel, "Hypnosis as Evidence," cited in note 49, 31 Cal.3d at 65; Kroger and Douce, "Hypnosis in Criminal Investigations," cited in note 49, 31 Cal.3d at 65; and Reiser, Handbook of Investigative Hypnosis, cited in note 36, 31 Cal.3d at 59. The Attorney General's response brief to the

California Attorneys for Criminal Justice cited additional scientific authorities, including Reiser, supra, and Diamond, "Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness," cited in note 34, 31 Cal.3d at 56. Finally, Titman's opening brief on appeal and supplemental brief cited a number of scientific publications. Thus, all parties have relied in the case below in scientific authority, and all the major papers discussed in the opinion of the California Supreme Court were also discussed in briefs and argument.

A dialogue has been carried on in the California courts for several years on the propriety of hypnosis as a tool for enhancing recall by witnesses. That dialogue was first brought to this Court's attention in Quaglino v. State of California, No. 77-1288, cert. denied, 99 S.Ct. 599 (1978). Quaglino relied extensively on scientific literature in petitions both to this Court

and to the California Supreme Court, without any objections from the Attorney General.

The decisions of other state courts in this area have also extensively cited the scientific literature. See, e.g., State v. Mack, 292 N.W.2d 764 (Minn. 1980) and State v. Hurd, 414 A.2d 291 (N.J. Super. 1980), affirmed, 432 A.2d 86 (1981). Thus, it could come as no surprise to the California Attorney General that similar use of judicial notice would be made by the California Supreme Court in this case.

The California Attorney General does not suggest to this Court that the widespread scientific skepticism on hypnosis as a reliable fact-finding tool is misplaced or that the Attorney General was denied the opportunity to show otherwise. Indeed, the contrary is clear; this case would never have gotten this far had the People of the State of California not failed to meet their burden of proof at the trial level.

For all the above reasons, no possible due process issue exists in this case.[2/]

[2/] The California Attorney General also casually suggests, without citation of relevant authority, that the Shirley rule may create an unconstitutional "conclusive presumption" of incompetence to testify. If there were such a constitutional defect, it is unclear that the California Attorney General would have standing to assert it. Moreover, the doctrine of "conclusive presumptions" cannot generally be used by this Court to invalidate rules of evidence designed to protect against untrustworthy testimony. See Usery v. Turner Alcorn Mining Co., 428 U.S. 1, 31-33, 49 L.Ed.2d 752 (1976).

IV. THE ATTORNEY GENERAL'S OBJECTIONS TO THE CALIFORNIA SUPREME COURT'S EXCEPTION FOR TESTIMONY OF HYPNOTIZED DEFENDANTS GIVES THIS COURT NO BASIS FOR INTERVENTION.

The California Supreme Court, in dictum following its ruling on the admissibility of the complaining witness's testimony in this case, noted a possible exception:

> "[W]hen it is the defendant himself - not merely a defense witness - who submits to pretrial hypnosis, the experience will not render his testimony inadmissible if he elects to take the stand. In that case, the rule we adopt herein is subject to a necessary exception to avoid impairing the fundamental right of an accused impairing the fundamental right of an accused to testify in his own behalf. People v. Robles (1970) 2 Cal.3d 205, 214-215."

(Modification of opinion, 31 Cal.3d at 918c.)

The scope and extent of the "necessary exception" are left undecided by the California Supreme Court's modified opinion, and the cited authority (People v. Robles, 2 Cal.3d 205, 214-215 [1970]) does not clarify that issue. Robles merely recognized a

"fundamental" right of a defendant to testify on his own behalf extends to testimony which is "irrelevant, immaterial, or incompetent," as suggested by the California Attorney General (petition for certiorari at 34), or which cannot be waived (e.g., by knowingly and voluntarily submitting to hypnosis).

The two-sentence dictum of the California Supreme Court on this issue has all the weaknesses of the decision of the Alabama Supreme Court in McAdory, supra, which led this Court to conclude that no case or controversy existed which warranted intervention by this Court. When an appropriate case of a hypnotized defendant comes before it, the California Supreme Court has a multitude of options open to it, all consistent with its statement in this case. For instance, the Court might hold that knowing voluntary submission to hypnosis constitutes a waiver of the right to testify

or might hold that a defendant must make a showing of reliability, albeit not as stringent as required by People v. Kelly, supra. In the absence of a clear ruling from the California Supreme Court based upon a factual record on the subject, it would be unwise in the extreme for this Court to step into the breach and hold that a denial of due process has occurred.

From a two-sentence statement in the California Supreme Court's decision, the Attorney General seeks to maintain its due process rights have been violated, yet the Attorney General has offered not a single authority from any court in the nation to support its claim. The lack of cited authority for the Attorney General's position is not surprising, because there is none.

The Attorney General's argument may be broken into three sub-assertions: (1) that as a matter of federal constitu-

tional law, the defendant has no right to present evidence which the prosecution in an analogous situation could not present; (2) that the California Supreme Court has no power to grant to criminal defendants greater rights than the federal Constitution recognizes; and (3) that a violation of the asserted limits on the power of the California Supreme Court denies the Attorney General of due process. None of those sub-assertions has any merit.

First, this Court has long recognized the right of criminal defendants to present evidence which might not be sufficiently probative to meet state relevancy requirements. In particular, in Chambers v. Mississippi, 410 U.S. 284, 302, 35 L.Ed.2d 297 (1973), this Court held that state rules of evidence "may not be applied mechanistically to defeat the ends of justice" when, although applied generally they may be "designed to assure both fairness and

reliability," they prevent the defendant on the facts of the case from presenting relevant evidence. This Court has continued to adhere to the principles set forth in Chambers. See, e.g., Green v. Georgia, 442 U.S. 95, 60 L.Ed.2d 738 (1979). Thus, the California Supreme Court would be in error not to recognize that a "mechanistic" application to defendants of the evidentiary rules set forth in Shirley would violate federal due process when the defendant could establish that his testimony after hypnosis was probative and trustworthy. At least one California appellate court has made similar applications of Chambers; see People v. Reeder, 82 Cal.App.3d 543, 553, 147 Cal. Rptr. 275 (2d Dis. 1978). Chambers and Green may require, for instance, that if a defendant is hypnotized under appropriate criteria for reliability (notes 21 and 23, 31 Cal.3d at 339, decision below), the testimony elicited at trial may not be excluded.

Moreover, there is a clear constitutional distinction between testimony of the defendant and testimony of witnesses against the defendant in the area of hypnosis. While the California Supreme Court chose not to decide Shirley on the basis of the "confrontation clauses" of the California and U.S. Constitutions, it clearly could have done so. Several courts, including the California Supreme Court, have recognized that hypnosis-enhanced memory can block effective cross-examination since it eliminates the subject's legitimate doubts. People v. Shirley, 31 Cal. 3d at 66; People v. Hurd, 432 A.2d 86, 94 (N.J. 1981); and State v. Mack, 292 N.W.2d 764, 770 (Minn. 1980). Thus, hypnosis interferes with the right of confrontation, which this Court has recognized to include a defendant's right to cross-examine witnesses. See, e.g., Ohio v. Roberts, 448 U.S. 36, 65 L.Ed.2d 597 (1980) and Douglas v. Alabama, 380 U.S. 415, 13 L.Ed.2d 934 (1965).

Whether or not, as appears from the facts of the numerous cases in the state courts, the Constitution requires a distinction between hypnosis testimony for prosecution witnesses and for the defendant, there is nothing to prevent the California Supreme Court from granting criminal defendants additional protection not specifically required by the United States Constitution. To hold otherwise would totally overturn the basic constitutional principle that federal power to interfere with the states is limited. Only recently, this Court has reconfirmed California's "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the federal Constitution." Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81, 64 L.Ed.2d 741 (1980). California's own Attorney General, without reference to any supporting authority, would have this Court for the first time overturn that sovereign right in a case in which

the alleged error of the California Supreme Court was unnecessary for the outcome of the case.

For the Attorney General to make the further claim that a distinction between accuser and accused, which is probably required by the due process and confrontation clauses of the United States and California Constitutions is itself a denial of due process, borders on the absurd; since the California Attorney General has not provided this Court with a single supporting authority, the argument requires no further response.[3/]

[3/] See Rule 21.5, Supreme Court Rules.

CONCLUSIONS

For the above reasons, the California Attorney General's petition for certiorari is totally without merit and should be denied.

Dated: August 10, 1982.

Respectfully submitted,

EPHRAIM MARGOLIN
NICHOLAS C. ARGUIMBAU
STEPHEN C. HOSFORD

By _____
Ephraim Margolin

Attorneys for Respondent

DEPUTIES
REMO C. MATTEOLI
G. E. SCHNEIDER
JOHN C. ROSSI
ROBERTA NICCO
SAN FRANCISCO

ROBERT F. JOHNSON
R. D. BARROW
LOS ANGELES

OFFICE OF THE CLERK

Supreme Court of California

SAN FRANCISCO, CALIFORNIA
LAURENCE P. GILL, CLERK

OFFICES

SAN FRANCISCO 94102
4280 STATE BUILDING
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LOS ANGELES 90010
3580 WILSHIRE BLVD.
(213) 736-2902

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100 LIBRARY AND COURTS BUILDING
(916) 322-5957

July 2, 1982

Ephraim Margolin, Esq.
240 Stockton Street
San Francisco, CA 94108

Re: S.F. 24441 - Brosnahan et al. v. Brown et al.

Dear Counsel:

In addition to those questions submitted to counsel in our letter of July 1, we would appreciate if counsel would address the following matters:

1. Should the court construe the single subject rule more narrowly for initiatives than for legislation? (See Schmitz v. Younger (1978) 21 Cal.3d 90, 98-100 (dissenting opinion of Justice Manuel).)

2. Does article IV, section 9 apply to initiatives? If so, how does the statement that "A statute may not be amended by reference to its title", but only by re-enactment of the section as amended, affect provisions of an initiative which:

(a) repeal a statute by reference to its title?

(b) declare a statute "inoperative" by reference to its title?

(c) repeal or amend by implication statutes not mentioned in the initiative?

3. In order to determine whether the initiative embraces more than one subject (and possibly in order to determine whether it amends statutes in a manner which violates article IV, section 9), we may have to determine the scope and meaning of the initiative's provisions. We therefore inquire:

(a) What is the substantive effect, if any, of the "right to safe schools" declared in section 3, subdivision (c) of the initiative? Does it create or alter

EXHIBIT "A"

existing liabilities or obligations? Does it overturn or modify any statute, ordinance, regulation or judicial decision? What is the remedy, if any, of a person assigned to an unsafe school? Of a person injured as a result of an unsafe condition at school?

(b) Does the "right to Truth-in Evidence" in section 3, subdivision (d) of the initiative overturn or modify any existing statute or judicial decision? Does it overturn judicial decisions relating to the admissibility of polygraph evidence, voiceprint evidence, wiretap evidence, and hypnotically aided testimony?

(c) Does the language in section 3, subdivision (f) of the initiative that a prior felony conviction may be "used without limitation for purposes of . . . enhancement of sentence" repeal or modify any statute?

(d) Does the language in section 4, subdivision (c) of the initiative that "evidence of . . . a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment" repeal or modify any statute? Is that language consistent with section 3, subdivision (d) and section 4, subdivision (b) of the initiative?

(e) Does the language in section 7, subdivision (a) of the initiative, which prohibits plea bargaining unless, among other things "a reduction or dismissal would not result in a substantial change in sentence", refer to the maximum possible sentence or to the actual sentence the defendant receives?

Very truly yours,

LAURENCE P. GILL
Clerk of the Supreme Court

By: Remo C. Matteoli
Chief Deputy Clerk

RCM:dms

cc: Rec.
Reg.
L.A.

F. L. KAVANAGH
CHIEF DEPUTY

DEPUTIES
REMO C. MATTEOLI
G. E. SCHNEIDER
JOHN C. ROSSI
ROBERTA NICCO
SAN FRANCISCO

ROBERT F. JOHNSON
R. D. BARROW
LOS ANGELES

OFFICES

SAN FRANCISCO 94102
4000 STATE BUILDING
(415) 557-0327

LOS ANGELES 90010
3580 WILSHIRE BLVD.
(213) 736-2503

SACRAMENTO 95814
100 LIBRARY AND COURTS BUILDING
(916) 323-0327

OFFICE OF THE CLERK

Supreme Court of California

SAN FRANCISCO, CALIFORNIA
LAURENCE P. GILL, CLERK

April 10, 1981

Stephen C. Hosford, Esq.
12882 Main Street
Garden Grove, CA 92640

Harley D. Mayfield, Deputy
John W. Carney, Deputy
Office of Attorney General
110 West A Street
San Diego, CA 92101

Crim. 21775 - People v. Shirley

Gentlemen:

In the above-entitled cause counsel are requested to prepare supplemental briefs addressing the following questions:

Did the trial court err in denying appellant's pretrial motion to exclude the testimony of Catherine Crump (see Augmented Reporter's Transcript for June 19, 1979)? If so, was the error prejudicial?

Please be advised that the legal issues raised by these questions have already been extensively briefed in the case of People v. Charles Stewart Johnson, Crim. 21624, now pending before this court. In particular, counsel should avoid duplicating any of the points and authorities presented in the three amicus curiae briefs, and the three reply briefs thereto, filed in Johnson. These six briefs have previously been served on respondent herein, but not on appellant. Accordingly, file copies of the six briefs are enclosed for appellant's use; for respondent's convenience, identifying copies of the cover sheets of the same briefs are enclosed.

Counsel may raise additional legal issues not discussed in the foregoing briefs, and should apply any and all relevant legal issues to the facts of the case at bar.

Appellant's supplemental brief is to be served and filed on or before April 27, 1981. Respondent's supplemental

EXHIBIT "B"

brief is to be served and filed on or before May 11, 1981. Any reply brief by appellant is to be served and filed on or before May 21, 1981.

Very truly yours,

LAURENCE P. GILL
Clerk of the Supreme Court

By: J. L. KAVANAGH
Chief Deputy

JLK:ms

Enclosures

cc: Rec.
Reg.
L.A.

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No. 82-78

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

DONALD LEE SHIRLEY,

Respondent.

On Appeal from the Supreme Court

of California

MEMORANDUM FOR RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

EPHRAIM MARGOLIN
NICHOLAS C. ARGUIMBAU
240 Stockton Street, 3d floor
San Francisco, Ca. 94108
Telephone: (415) 421-4347

STEPHEN C. HOSFORD
12882 Main Street
Garden Grove, Ca. 92640
Telephone: (714) 537-7750

Attorneys for Respondent

No. 82-78

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Petitioner,	)
vs.	)
DONALD LEE SHIRLEY,	)
Respondent.	)

MEMORANDUM FOR RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT

Respondent files this memorandum to advise the Court of facts which, in our view, render this cause moot.

On August 17, 1982, following retrial, respondent was acquitted of the criminal charges against him.[1/] MR. SHIRLEY is, accordingly, beyond any discernible penal interest of petitioner. Since "an actual controversy must exist at [all] stages of appellate or certiorari review and not simply at the date the action is initiated" (Roe v. Wade, 410 U.S. 113, 125 (1973)), respondent's acquittal and discharge deprives the cause of "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." Aetna Life Ins. Co. v. Haworth, 300 U.S. 227,

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1/ In addition, by opinion filed on September 2 , 1982, a majority of the California Supreme Court upheld the constitutionality of "Proposition 8," an initiative measure known as the "Victims' Bill of Rights," which includes the addition to Article I, § 28(d) of the California Constitution, the text of which is set forth in respondent's Opposition to Petition for Certiorari at 4. In light of that provision's explicit limitation on judicially-created rules of evidence in California courts, the prospective vitality of the California Supreme Court's decision in Shirley is problematical.

240-241 (1937).[2/]

There is, in short, no longer a "case" within the meaning of Article III upon which any decree of this Court could operate. Accordingly, since "[i]t has long been [this Court's] considered practice not to decide abstract, hypothetical, or contingent questions, or to decide any constitutional question in advance of the necessity for its decision" (Alabama State Federation of Labor v. McAdery, 325 U.S. 450, 461 (1945)), counsel respectfully suggest that the issues arising out of the now fully concluded proceedings against MR. SHIRLEY are moot and that California's petition for certiorari ought to be denied on that ground.

Dated: September 8, 1982.

Respectfully submitted,

EPHRAIM MARGOLIN
STEPHEN C. HOSFORD

By _____
Ephraim Margolin

Attorneys for Respondent

[2/] Mr. Shirley is neither a fugitive from justice (cf. Molinaro v. New Jersey, 396 U.S. 356, 366 (1970)), nor does this cause fall within that narrow class of cases saved from mootness because they present issues "capable of repetition, yet evading review" (Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 498, 515 (1911). Cf. Quaglino v. People of the State of California, No. 77-1288, cert. denied, 99 S.Ct. 599 (1978).

PROOF OF SERVICE BY MAIL

ATTORNEYS:

EPHRAIM MARGOLIN
240 Stockton Street, 3d fl.
San Francisco, Ca. 94108

STEPHEN C. HOSFORD
12882 Main Street
Garden Grove, Ca. 92640

PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

vs.

DONALD LEE SHIRLEY,
Respondent.

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the City and County of San Francisco, in which County the within mentioned mailing occurred, and not a party to the subject cause. My business address is 240 Stockton Street, San Francisco, Ca. 94108.

I served the within MEMORANDUM FOR RESPONDENT SUGGESTING THAT THE CAUSE IS MOOT: An original and nine (9) copies on the U.S. Supreme Court as follows: Alexander L. Stevas, Clerk, Office of the Clerk, Supreme Court of the United States, Washington, D. C. 20543, of which a true and correct copy of the document filed in the cause was affixed, by placing one (1) copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee, respectively, as follows:

George Deukmejian, Esq.
Attorney General
John W. Carney, Esq.
Deputy Attorney General
110 West A St., #700
San Diego, Ca. 92101

Cecil Hicks, Esq.
Orange County District
Attorney
P. O. Box 808
Santa Ana, Ca. 92702

Lee A. Branch
Orange County Clerk
P. O. Box 838
Santa Ana, Ca. 92702
For delivery to:
The Hon. Mason L. Fenton

Clerk, Court of Appeal
Fourth Appellate District
Division Two
303 West Third St., #640
San Bernardino, Ca. 92401

Clerk, Supreme Court
State of California
350 McAllister St., #4050
San Francisco, Ca. 94102

Each envelope was then sealed and, with the postage prepaid, deposited in the U.S. mail by me at San Francisco, Ca., on the 8th day of September, 1982.

There is a delivery service by U.S. mail at each place so addressed or regular communication by U.S. mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed at San Francisco, California, this 8th day of September, 1982.

DEANNA T. GALESTIAN

No. 82-78

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

RECEIVED
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SUPREME COURT, U.S.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

On Appeal from the Supreme Court
of California

REPLY OF PETITIONER TO MEMORANDUM FOR RESPONDENT OF 8 SEPTEMBER 1982

GEORGE DEUKMEJIAN
Attorney General

ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General
Criminal Law Division

DANIEL J. KREMER
Assistant Attorney General

HARLEY D. MAYFIELD
Deputy Attorney General

JOHN W. CARNEY
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone (714) 237-7672

Attorneys for Petitioner

ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

THE PEOPLE OF THE STATE OF CALIFORNIA, Petitioner,	)	
v.	)	No. 82-78
DONALD LEE SHIRLEY, Respondent.	)	

REPLY OF PETITIONER
TO MEMORANDUM FOR RESPONDENT
OF 8 SEPTEMBER 1982

Petitioner confirms that, on August 17, 1982, respondent was acquitted of the criminal charges against him. Petitioner, however, does not believe such acquittal should render the matter moot.

The decision of the California Supreme Court in the Shirley case was meant to have and has had a practical effect beyond the Shirley case itself. The case will foreclose the future use of hypnosis in California and may effect retroactively cases where hypnosis was used before the decision. Thus, the People of this State remain aggrieved by all those constitutional defects present in the Shirley decision.

The acquittal of Mr. Shirley will not affect the vigor of advocacy in this matter. The briefing and argument in the California Supreme Court was in significant part handled by Mr. Ephraim Margolin for the California Attorneys for Criminal Justice (a respected statewide association of criminal defense attorneys). Indeed, Mr. Margolin was the author of Mr. Shirley's Opposition to Certiorari in this Court. This organization will clearly

continue to vigorously present the matters offered in their Opposition to Certiorari. (See Carroll v. Princess Anne (1968) 393 U.S. 175, 179; Roe v. Wade (1972) 410 U.S. 113, 125; Dunn v. Blumstein (1971) 405 U.S. 330, 333 fn. 2; Nebraska Press Association v. Stuart (1975) 427 U.S. 539, 546-547; see also Stern, Grossman, Supreme Court Practice, 5th ed., pp. 884-897.)

Respondent argues the passage of Proposition 8, an initiative dealing in part with significant changes in the rules of evidence in criminal cases, and the upholding of that initiative by the California Supreme Court in Brosnahan v. Brown (1982) ___ Cal.3d ___ (Calif. Supreme Ct. No. S.F. 24441, decided September 2, 1982) renders the continued validity of the California Supreme Court decision in the Shirley case problematical. It must be noted that the Brosnahan decision does not deal with the validity of any portion of Proposition 8, but rather deals only with the regularity of its passage. No case in this State has overturned the Shirley opinion.

For the foregoing reasons, petitioner submits the matter is not moot.

Respectfully submitted,

GEORGE DEUKMEJIAN
Attorney General
ROBERT H. PHILIBOSIAN
Chief Assistant Attorney General
Criminal Law Division
DANIEL J. KREMER
Assistant Attorney General
HARLEY D. MAYFIELD
Deputy Attorney General

JOHN W. CARNEY
Deputy Attorney General

Attorneys for Petitioner

JWC/sm
SD82US0006

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

GEORGE DEUKMEJIAN
Attorney General
State of California
JOHN W. CARNEY
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101

PEOPLE OF THE STATE
OF CALIFORNIA,
Petitioner,

v.

DONALD LEE SHIRLEY,
Respondent.

I, THE UNDERSIGNED, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California, 92101.

I have served the within REPLY OF PETITIONER TO MEMORANDUM FOR RESPONDENT OF 8 SEPTEMBER 1982 as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and nine copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

STEPHEN C. HOSFORD
Attorney at Law
12882 Main Street
Garden Grove, California 92640

CECIL HICKS
District Attorney
County of Orange
Post Office Box 808
Santa Ana, California 92702

LEE A. BRANCH
County Clerk
County of Orange
Post Office Box 838
Santa Ana, California 92702
FOR DELIVERY TO
HON. MASON L. FENTON, JUDGE

EPHRAIM MARGOLIN
Attorney at Law
Third Floor
240 Stockton Street
San Francisco, California 94108

CLERK OF THE COURT
Court of Appeal
Fourth District, Division Two
303 West Third Street, Room 640
San Bernardino, California 92401

CLERK OF THE COURT
Supreme Court
State of California
350 McAllister Street, Room 4050
San Francisco, California 94102

Each aforementioned envelope, with the postage prepaid, was sealed and deposited in the United States Mail by my at San Diego, California, on the fifteenth day of September, 1982. There is a delivery service by United States Mail at each place addressed above, and regular communication by United States Mail between the place of mailing and each place addressed above.

I declare under penalty of perjury that the foregoing is true and correct.

Fifteenth Day of September,
1982, at San Diego, California.

Steven McGee

STEVEN MCGEE